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November 17, 2005

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20024

Subject: In the Matter of Implementation of Pay Telephone Provisions
CC Docket No. 96-128

Dear Madam Secretary:

In accordance with Section 1.1206 of the Commission's rules, 47 C.F.R. Section 1.1206, we hereby provide you with notice of an oral ex-parte communication in connection with the above-captioned proceeding. On November 17, 2005, the undersigned counsel spoke with the following FCC officials as counsel for the Northwest Public Communications Council ("NPCC"): Kathleen Abernathy, Russell Hanser, Scott Bergmann, Tamara Priess, and Pamela Arluk. We discussed the pending petitions for declaratory ruling filed in Docket 96-128 by the IPTA, SPCA, and IPANY ("Petitions"). In particular, counsel inquired as to the status of any pending activity on the Petitions and the likelihood of action on the petitions by the end of this year. Further, counsel urged FCC action on the petitions as soon as reasonably possible. Counsel noted that hurricane Katrina provided another recent example of the continuing importance of payphones to the nation's communications infrastructure.

In addition to discussing the current status of the FCC's review of the Petitions, counsel provided the FCC representatives with a brief update as to the status of two pending proceedings involving actions for payphone access line refunds under the same FCC order that was the subject of the Petitions. Specifically, in a complaint by the NPCC filed with the Oregon Public Utility Commission ("OPUC"), the OPUC is continuing to hold the complaint in abeyance pending a ruling by the FCC on the Petitions. In an action brought by 51 payphone service providers against Qwest, including a number of members of the NPCC, the case is still pending at the Ninth Circuit Court of Appeals. Qwest is urging the Ninth Circuit to defer to the FCC's action on the Petitions. Oral argument is scheduled to be heard by the Ninth Circuit on December 8, 2005. A decision is expected in the middle of 2006.

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In connection with the meeting, the undersigned counsel provided the FCC representatives with the following documents:

1. Handout entitled: "FCC Guidance Awaited For 15 States."
2. Order of the Oregon Public Utility Commission in Docket No. DR 26/UC 600, entered May 3, 2005.
3. Copy of a Perspectives magazine article regarding the impact of hurricane Katrina on payphone and cellular telephone service.

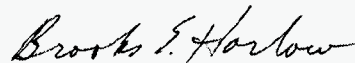
Copies of all three documents are attached hereto. After the meetings, further documents were transmitted via email, as follows:

1. Comments filed by NPCC in CC Docket No. 96-128 on August 26, 2004 and January 18, 2005 to Russell Hanser.
2. Order, 12 FCC Rcd. 21,370 (1997) to Scott Bergmann.
3. Oregon Court of Appeals decision in *Northwest Public Comm's Council v. PUC*, 196 Ore. App. 94, 100 P.3d 776 (2004) to Pamela Arluk.

Copies of these documents are also attached.

We trust you will find this information to be useful. Should you have any questions or require any additional information, please contact the undersigned counsel directly.

Very truly yours,



Brooks E. Harlow

cc: Ms. Kathleen Abernathy
Mr. Russell Hanser
Mr. Scott Bergmann
Ms. Tamara Priess
Ms. Pamela Arluk

FCC Guidance Awaited For 15 States

Petitions to the Commission Pending in CC Dkt. No. 96-128:

Petition for Declaratory Ruling of Illinois Public Telecommunications Association (July 30, 2004)

Petition for Declaratory Ruling of Independent Payphone Association of New York (December 24, 2004)

Petition for Declaratory Ruling of Southern Public Communications Association (November 9, 2004)

The Petitions seek enforcement of the Commission's orders in docket 96-128 regarding the charges for payphone access line services provided to payphone service providers ("PSPs") pursuant to 47 U.S.C. §§ 201, 202, and 276.

RBOCs overcharged PSPs for years in violation of the Commission's New Services Test ("NST"). The Commission adopted the NST to eliminate RBOC rate discrimination as required by 47 U.S.C. § 276(a)

The Commission waived compliance with the NST by the deadline of April 15, 1997, *if* the RBOCs would refund charges in excess of NST-compliant rates

In all three petitions, RBOCs claim state-law "Filed Rate/Filed Tariff" doctrine trumps the FCC's orders for refunds of payphone access line overcharges and the non-discrimination requirements of Section 276(a).

Oregon PUC has case pending by PSPs against Qwest for refunds for overcharges in Oregon

Qwest asserted the "Filed Rate Doctrine" as a defense

OPUC is awaiting FCC action on the Petitions in 96-128 (order attached)

Ninth Circuit has case pending by PSPs against Qwest for refunds for overcharges in 11 states

Qwest has asked the Court to delay ruling pending FCC action on the Petitions

Oral argument is December 8, 2005

Decision not expected until mid-2006

BEFORE THE PUBLIC UTILITY COMMISSION**OF OREGON**

DR 26/UC 600

THE NORTHWEST PUBLIC)
COMMUNICATIONS COUNCIL,)

Complainant,)

v.)

QWEST CORPORATION,)

Defendant.)

ORDER

DISPOSITION: ALJ RULING AFFIRMED

This matter is before the Public Utility Commission of Oregon (OPUC) on cross motions for summary judgment filed by the Northwest Public Communications Council (NPCC) and Qwest Corporation (Qwest).¹ The principal issue raised by the motions concerns whether Qwest is bound by the refund provisions of Federal Communications Commission (FCC) Order DA 97-805 (hereafter, the *Waiver Order*). More specifically, the issue is whether the *Waiver Order* requires Qwest to refund a portion of the intrastate Payphone Access Line (PAL) rates paid by Payphone Service Providers (PSPs) since April 15, 1997, because those rates do not comply with the "New Services Test" (NST) established in the FCC's *Payphone Orders*.²

On March 23, 2005, the Administrative Law Judge (ALJ) issued a Ruling holding this proceeding in abeyance pending a decision by the FCC on certain petitions for declaratory ruling in CC Docket 96-128 (Consolidated Petition Proceeding.) Among the reasons cited by the ALJ for his decision is the fact that the issues raised by the

¹ For purposes of this order, "Qwest" includes its predecessor, U S WEST Communications, Inc.

² Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, First Report and Order, 11 FCC Rcd 20541 (Sept. 20, 1996) (*First Payphone Order*); Order on Reconsideration, 11 FCC Rcd 21233 (Nov. 8, 1996) (*Payphone Reconsideration Order*), aff'd in part and remanded in part, *Illinois Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997); Second Report and Order, 13 FCC Rcd 1778 (Oct. 9, 1997) (Second Payphone Order), vacated and remanded, *MCI Telecomms. Corp. v. FCC*, 143 F.3d 606 (D.C. Cir. 1998); Third Report and Order and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545 (Feb. 4, 1999) (*Third Payphone Order*), aff'd, *American Pub. Communications Counsel v. FCC*, 215 F.3d 51 (D.C. Cir. 2000). The *First Payphone Order* and the *Payphone Reconsideration Order* are collectively known as the *Payphone Orders*.

parties in this case are currently pending before the FCC in the Consolidated Petition Proceeding.

On April 4, 2005, NPCC filed a motion requesting certification of the ALJ's Ruling pursuant to OAR 860-014-0091(1)(a). NPCC argues that holding this proceeding in abeyance pending FCC action may result in substantial detriment to the public interest and undue prejudice to NPCC's members. It states that its "sole concern" is the potential delay that may take place before the FCC decides whether to proceed in the Consolidated Petition Proceeding. It emphasizes that any undue delay would severely prejudice NPCC members because of the substantial and continuing decline of the payphone industry.

In the alternative, NPCC requests that the Commission petition the FCC to address several issues set forth in its motion. As a further alternative, it suggests that the Commission Chairman request the FCC act promptly to resolve the Consolidated Petition Proceeding and provide guidance on the issues NPCC poses.

On April 11, 2005, Qwest responded to NPCC's motion for certification. Although it disagrees with the ALJ's decision to hold this proceeding in abeyance, Qwest maintains that NPCC's motion does not meet the requirements of OAR 860-014-0091(1)(a). If the matter is certified, Qwest will not oppose a Commission decision reversing the Ruling and allowing the case to proceed without delay.

Qwest also disagrees with NPCC's request that the Commission petition the FCC to resolve issues in this docket. It asserts that the latter proposal is: (a) outside the scope of the ALJ Ruling, (b) requests the Commission to do what NPCC has deliberately chosen not to do; and (c) asks the Commission to pose questions to the FCC that are stated in an unfair and argumentative manner.

Although the prospect of procedural delay is generally not sufficient to meet the requirements of OAR 860-014-0091(1)(a), the ALJ certified his Ruling to the Commission because of the unusual circumstances surrounding this proceeding. Upon review, the Commission concludes that the ALJ's decision to hold this proceeding in abeyance should be affirmed for the reasons set forth on pages 8-9 of the Ruling.

NPCC's primary reason for challenging the ALJ's Ruling centers around its concern that the FCC will not act in a timely manner to resolve the issues in the Consolidated Petition Proceeding. As the ALJ explains, however, a decision by this Commission interpreting the *Waiver Order* will not expedite the resolution of this dispute. Given the amounts at issue, it is virtually certain that any decision we reach will be appealed, a process that we agree may take years to conclude. After a decision by the Oregon appellate courts, it is equally certain that the losing party will petition the FCC to preempt the state court decision pursuant to Section 276(c) of the

Telecommunications Act.³ Thus, in the end, the parties will find themselves in the same place as the petitioners in the Consolidated Petition Proceeding.

Another reason for holding this matter in abeyance is that it will provide the FCC an opportunity to fashion a comprehensive solution to the issues in a manner consistent with the requirements set forth in its *Payphone Orders*. As noted by the ALJ, the petitioners in the Consolidated Petition Proceeding have requested the FCC to consider remedies that go well beyond what NPCC has requested in this case. We agree with the ALJ that it is reasonable to allow the FCC time to determine whether it will undertake to resolve these matters.

In reaching this decision, we note that the ALJ's decision does not postpone this matter indefinitely. The Ruling allows the parties to move to reopen the proceeding if circumstances arise warranting such action. To ensure there is no undue delay, the parties may ask the Commission to revisit this matter if the FCC has not acted by the end of this year.

It is also important to emphasize that our decision to affirm the ALJ's Ruling does not affect our obligation to ensure that Qwest's PAL rates are consistent with the NST, as required by the remand of the Oregon Court of Appeals in *Northwest Public Communications Council v. OPUC*.⁴ The Commission intends to move forward with that process, notwithstanding any action taken by the FCC in the Consolidated Petition Proceeding.

As a final matter, the Commission declines NPCC's invitation to pose questions to, or seek guidance from, the FCC. We agree with Qwest that NPCC's request is inappropriate. NPCC is effectively asking the Commission to do what NPCC has deliberately chosen not to do; that is, file a petition with the FCC for enforcement of the *Waiver Order*. As explained in the ALJ's Ruling, NPCC has already filed extensive comments in the Consolidated Petition Proceeding that articulate the details of its dispute with Qwest and request guidance from the FCC on specific issues. If NPCC believes that it is necessary to pose additional questions to the FCC, there is no reason why it cannot do so.⁵

³ Section 276(c) provides: "To the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements." All of the petitioners in the Consolidated Petition Proceeding have alleged preemption. As noted by the ALJ, NPCC has joined in these claims.

⁴ 196 Ore. App. 94, 100 P.3d 776, 2004 Ore. App. LEXIS 1471 (November 10, 2004).

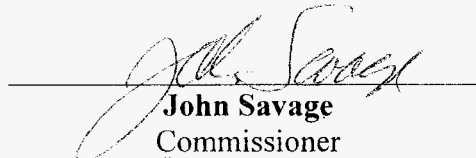
⁵ Qwest claims that NPCC is asking the Commission to advance NPCC's litigation strategy to avoid violating the prohibition against simultaneously litigating the same claim in two forums. *Qwest Response* at 3. NPCC could overcome such a problem by withdrawing its Complaint/Request for Declaratory Ruling in this docket, and refiling at a later date, if necessary.


ORDER

IT IS ORDERED that the Ruling issued by the Administrative Law Judge in this matter on March 23, 2005, is affirmed.

Made, entered, and effective MAY 03 2005.


Lee Beyer
Chairman


John Savage
Commissioner


Ray Baum
Commissioner



A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. The request must be filed with the Commission within 60 days of the date of service of this order and must comply with the requirements in OAR 860-014-0095. A copy of the such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.

PERSPECTIVES

ON PUBLIC COMMUNICATION • OFFICIAL MAGAZINE OF THE APCC®

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Volume 13

Number 11



Still standing

Gulf Coast PSPs work on rebuilding their businesses
and their lives after Hurricane Katrina

United in hope

Gulf Coast payphone service providers take the first steps in rebuilding their businesses and lives in the wake of the mass devastation wrought by Hurricane Katrina

In the wake of Hurricane Katrina, the shores of Mississippi, Louisiana and Alabama, once lushly landscaped and glittering with casinos and other tourist hot spots, now look barren. Homes, businesses and vegetation are gone. Residents say it looks like a bomb has gone off, or like a war zone.

Ray Campo, CEO of Mid City Payphone Co. Inc. in New Orleans, La., felt like he was in a war zone for 131 hours the week of Aug. 28.

Campo also serves as a registered nurse supervisor for Charity Hospital of New Orleans. With Hurricane Katrina and her sustained winds of 145 mph bearing down on the Gulf Coast, Campo arrived at the hospital at 7 a.m. that Sunday. As head of one of the intensive care units, he was called in with other workers of the Code Grey Activation Team and set up around-the-clock 24-hour shifts to care for patients during the impending storm. He didn't leave the hospital until 6 p.m. Friday, when everyone was evacuated. The days in between will live in infamy for him.

"Charity Hospital of New Orleans is housed in a 70-year-old building, whose windows are designed to pop out when under stress. When Katrina hit Monday morning, there was the wind and the heavy rain, and we had windows popping out. On the street level it was raining glass. We then lost power, but fortunately our emergency generator came on," Campo recalls. The rain finally subsided by late Monday evening, so he went outside and crossed the street, Tulane Avenue, to check his payphones outside the Burger King. (Campo owns 375 payphones and holds the City of New Orleans' payphone contract.)

"Three of the payphones were out of service, but one was still working," he says. "At the time, there was about two inches of water running in the gutter along the street. The next morning, there was water lapping at the front door of the hospital, and the water was

chest deep on Tulane Avenue. We learned about the levee break at the Seventeenth Street Canal and knew we were in for it then. We were an island in the city."

Hospital staff started hand carrying patients to higher levels in the building to avoid the flood waters. By Wednesday morning, the emergency generator also had lost power, so Campo and his colleagues took turns pumping patients' air ventilators by hand. With no air conditioning, daytime indoor temperatures rose above 100°F. People started breaking the building's remaining windows in hopes of increasing air circulation. The hospital staff started rationing the food they had brought with them when they'd arrived Sunday — Campo had contributed a 15-pound smoked turkey, peanut butter and bread — making certain that patients and their visitors could eat. Thursday night, Campo had his last meal: a slice of bread and some creamed corn and water. The food was gone.

"FEMA [the Federal Emergency Management Agency] told us on Tuesday that they would help, but they didn't show up. We tried to evacuate the critically ill with the National Guard on Wednesday, but snipers in the parking garage next door started shooting at us," Campo says. "We had to suspend operations that night. Our hospital administrators then made deals through CNN and other media, and we had private groups from Louisville, Ky., and Cocoa, Fla., come in with helicopters and air boats to evacuate some of our sickest patients. At 6 p.m. Friday, my staff accompanied patients on air boats to a heliport, and we were flown to Louis Armstrong Airport on Black Hawk helicopters. There were 250 of the Black Hawks in the air at any one time — it was like a commuter line. I got to see my family again that night."

Surveying the damage

Campo, unlike most payphone service providers (PSPs)

in the New Orleans area, got to see a number of his payphones the week after Katrina passed through. After Campo obtained the necessary "essential services" passes, Mid City Payphone employees were able to re-enter the city.

What they found was not very pleasant. "We were armed when we first went in. Reports were that people might shoot you for your water, and we were going to be carrying a lot of coin, because Katrina hit the day before our regular collections." Fortunately, there were no major problems, but it was a nightmare to get around in the city. "Water is covering the roads; trees are down; debris is everywhere. Nevertheless, we've been able to continue collecting and surveying damage."

Campo estimates that less than one-third of his route is operational; 50 payphones in Jefferson Parish, 30 in the French Quarter and 20 in uptown New Orleans continue to function. "I don't know how our call volume is because we have no dial tone in our

office. We haven't been able to poll the phones since 10:30 p.m. Aug. 29," Campo reports.

He adds that his payphone at 1201 Royal Street in the French Quarter was used by residents as a message board center during the storm and in the days following the hurricane (see photo on Page 17). "Someone had put an 8 1/2 by 11 inch tablet on it so people could post messages for family members they were looking for. That phone worked throughout the storm and afterward," he notes.

"It will take a while for things to come around," Campo says, referring not only to rebuilding the city he loves but to his payphone business as well. "I will need whole phones to replace most on my route. In some places, the case is all that's left. Doors are rusted shut. Mud is completely covering other phones. I desperately need Protel 8000 smart sets. I've spoken with BellSouth to see if they have any extra phones in any of their warehouses, and I'm looking into getting a bridge disaster loan."



This casino barge was ripped from its moorings and moved several thousand yards. It ended up on U.S. Highway 90 in Gulfport, Miss.



◀ Nearly three weeks after Hurricane Katrina, the water of Biloxi Bay still surrounded the bridge piers of Highway 90 between Biloxi, Miss. and Ocean Springs, Miss.

Continuing chaos

Also in need of whole phones to replace those lost to Katrina's wrath is J. Miller Enterprises Inc. of Metairie, La. J. Miller had about 450 payphones, mostly located in New Orleans and in the Gulf Coast casinos. J. Miller Vice President Karen Miller estimates that 80 percent of the payphones have been lost.

Indeed, BellSouth sustained an estimated \$600 million in infrastructure damage as a result of Katrina. Some 2.5 million BellSouth telephone lines were disabled, and 305,000 of those were still out of service as of Sept. 16. A number of central offices were still offline, with resumption of service expected to take at least several more weeks.

"Three weeks after the hurricane, we're still not able to get into the affected areas to see what has happened to our payphones. Most of our phones aren't answering as we poll them, but we don't know if it's because they don't have dial tone, or if the phones have been destroyed. We're sending people out now to check," Miller said on Sept. 19. New Orleans' mandatory evacuation was temporarily lifted Sept. 19, only to be re-established later in the day as Hurricane Rita marched closer to the Gulf of Mexico. The hurricane season doesn't end until Nov. 30, and authorities fear renewed flooding of the city if it is subjected to another storm or heavy rains.

"I feel like I'm in a war zone," Miller says. "There are National Guard troops everywhere — at the Post Office, the grocery store. Though it does make you feel safe. It's been crazy — I can't even find a bank. We have only one Post Office, and you can't get mail out. It's very primitive around here right now. There's a curfew that is really enforced. Everyone must be off the streets from 8 p.m. until 5 a.m.

"Three weeks after Katrina, we're still getting ice and food at distribution points. The roof of my house is still leaking. I still can't get my insurance adjuster here. I'm not sure if we'll be in the business a year from now. It's up to FEMA, I guess — what type of help it can provide. We need completely new phones in the effected areas. It's not just the water that was the problem — it's the dirt and mud.

"We'd love to be able to stay here," she continues. "I've lived in the New Orleans area since I was 10. The payphone business has been a good business for us. In the areas that are completely devastated, we probably won't replace our payphones because those areas may not be rebuilt. Some areas are just completely destroyed. They're bulldozing whole neighborhoods. Phones that didn't do well in some areas before, we probably won't re-install either. We'll need to look at revenue figures from before the hurricane to see which payphones it

AP/WIDE WORLD PHOTOS

makes the most sense to replace. Downtown — that's the area where people really depend on payphones. Some residents still didn't have phones in their homes. Cell phones also aren't working well around here, so I want to get our payphones back up as quickly as we can. People are really relying on them right now."

Helping those who need it the most

Tim Doskey, president of Doskey Communications Inc. in Metairie, has eight payphones, five of which are still working. "Payphones have been valuable during this crisis. The payphones have been really helpful to people who need help the most right now. Cell phones aren't working, but a number of payphones are, and people are using them," Doskey says.

Doskey notes that when he returned home after evacuating, the damage "was the worst I've ever seen. As a child, I went through Hurricane Betsy in the early '60s, but this is much worse. You couldn't get down any streets because of downed trees and power lines. It's just devastating, especially at night — it's so silent and dark."

He has been distributing food and water to the elderly and other people who have remained in the area. "One person said she had used a payphone to call a relative to let her know she was all right.

"We'll get our houses back to normal and our businesses back to normal," he says. "It will just take time."

Call volumes skyrocket

"Our business has taken a major hit, but we're most concerned about our family, employees and customers and hoping they're alive and didn't lose too much property," says Greg Chiasson, co-owner of PayPhones Inc. in Mandeville, La. Chiasson had 400 payphones, some 300 of which are down. Some are completely gone; others were flooded. "We haven't been able to get into New Orleans to see the extent of the damage to our phones since the city is still in lockdown," he reports.

PayPhones Inc. has most of its payphones at downtown hotels and at the New Orleans convention center, which is the third largest in the United States. The company had an additional several dozen coin-operated payphones there, as well as 400 credit card phones. "People stormed the convention center and



This was Griffin's Exxon in Gulfport, Miss., and it had six pumps, a car wash, a c-store and payphones.



An HSI Telecommunications vehicle stops at a military checkpoint in Long Beach, Miss.



This was Mac's c-store and restaurant in downtown Gulfport, Miss. It is three blocks inland from U.S. Highway 90.



After the hurricane, dozens of pieces of HSI Telecommunications equipment came in daily looking pretty battered.



The hurricane moved this house into the middle of the road in Bay St. Louis, Miss.



The town of Long Beach, Miss. was one of many that were hit pretty hard by Hurricane Katrina.

took it over as a shelter. I had to see on Fox News that my phones were on the floor, ruined. They destroyed all the payphones in the building," Chiasson says.

Chiasson did get to see the damage to some phones firsthand. "I met a FEMA worker at a hotel I'd evacuated to in Jackson, Miss.," he says. "He needed directions to get into New Orleans, and I needed his badge to get back in, so we got into New Orleans the next day [Aug. 30]."

Chiasson notes that his call volume at New Orleans hotels the three days before Katrina hit escalated tremendously. Operator services and toll-free calls spiked tenfold. For weeks after the storm, phones in outlying areas produced high volumes, since all cell towers were down.

PayPhones Inc. also lost 120 ATMs. "Every ATM cost us \$3,000 to \$5,000 and has \$4,000 to \$10,000 in cash in it. The machines are still under water, and the National Guard won't let us in to get them," Chiasson says.

Despite everything, Chiasson says he feels grateful and looks forward to rebuilding his business. "It's hard to focus on work until all the basic infrastructure comes back — phone service, water and electricity — and until the water recedes. Now I wish I had insurance on all of my equipment though. I think most PSPs don't get insurance; we think someone's going to steal just one phone, and we can cover that. You don't think about losing the majority of your equipment all at one time," he says.

No more business as usual

ETS Payphones Inc., which is headquartered in Lithia Springs, Ga., and operates 12,000 payphones, lost approximately half of its 680 payphones in Louisiana, Mississippi and Alabama. When the company learned of Katrina's approach, it figured New Orleans would be evacuated, so Harvey, La. Branch Manager Rob Wimsatt loaded the company truck and drove everything to Baton Rouge, where a temporary office was established. As of mid-September, most of the company's phones in New Orleans were still under water. Coin from phones that are being collected now is being sent to a Houston branch office once a week, because local banks aren't open.

Jeff Fennell, chief operating officer of ETS Payphones, says payphone call volumes

increased markedly after the hurricane passed. "In a 40- to 50-mile radius north and east of New Orleans, cell phone service was completely out," Fennell says. "So the payphones that were working saw increased usage in the 12 to 15 percent range. Payphones in towns north and west of New Orleans and by the Texas borders also were busy."

In fact, in the days following the storm, as more than 200,000 evacuees were bused and flown into Houston to stay at the Astrodome, other makeshift shelters and in private residences, payphone usage in that city increased as well. "We saw a 10 to 12 percent increase in coin drop and in dial-around for our 450 payphones all over Houston," said David Grudzinski, president of Coin Telecom Systems in Friendswood, Texas.

In addition, Fennell reported increased use at the company's phones in the Gulf region. There was a 12 percent increase in call volume the week of Aug. 23, and an 81 percent increase the week of Sept. 5.

Fennell says location owners have been contacting ETS and asking to get their payphones back up and running as quickly as possible since they're being inundated with requests to use their business lines. Due to the public's great need to get in touch with loved ones and insurance companies, ETS has not charged people in effected areas for local phone calls since Aug. 30. The free calls are expected to continue to be available through October. "We want to provide any comfort we can," Fennell explains.

Also providing comfort was Network PTS of San Leandro, Calif., which offered free five-minute calls to anywhere in the world from its payphones at retail, travel and municipal sites in the effected areas. The military and National Guard used various locations around the city as staging areas in the days immediately following the hurricane, and they transported evacuees from these sites as well. Network PTS supplied 0+ and 1+ service and gave away thousands of calls over a nearly three-week period.

"The phones in total averaged 2,000 calls a day the first few days after the hurricane," reports Torre Liano, executive vice president of Network PTS. "In this time of need, it was the old, faithful payphone that helped these people communicate. It feels good to know that we could help. If our payphones helped even one child find his or her parents, you can't put a price tag on that." Liano also noted that an Army general and some



This was downtown Pass Christian, Miss., which lost 100 percent of its registered businesses.



This Long Beach, Miss. shopping center had a Kmart.

HSI TELECOMMUNICATIONS

public officials called Network PTS to thank the company for having working payphones available.

'This was the Big One'

Of course, while New Orleans' biggest trouble was flooding, Katrina's fiercest winds and tidal surge took aim at the Mississippi coast. "The devastation along our coastline is unlike anything I've ever seen, and I've seen lots of hurricanes," says Edward Boudreaux, vice president of HSI Telecommunications Inc. in Mobile, Ala. HSI lost communication with about 10 percent of its 5,100 payphones along the Mississippi coast and in New Orleans.

"People expected this storm to go toward New Orleans. This is the 'Big One' everyone talked about for New Orleans. No one in the media even reported about the devastation on the Mississippi Gulf Coast for 48 hours after the storm passed through. Maybe it's because there was no way of communicating with any-

FCC earmarks funds for Katrina relief

Agency plans to spend \$211 million and offers other help

The Federal Communications Commission (FCC) plans to spend \$211 million to aid Hurricane Katrina relief efforts. The funds will provide mobile phones and 300 free minutes of air time to hurricane survivors who are eligible for federal disaster assistance; telecom service to health care workers assisting disaster victims; as well as help rebuild communications services at schools and libraries.

FCC Chairman Kevin J. Martin also proposes creating an independent panel to determine how to better meet citizens' communication needs during times of crisis. "The panel will make recommendations to the commission regarding ways to improve disaster preparedness, network reliability and communication among first responders such as police, firefighters and emergency medical personnel," Martin said in a Sept. 15 news release.

In other news, the FCC's Wireline Competition Bureau, acting on its own motion, has given BellSouth the OK to reroute long-haul traffic over its own interLATA network as needed to facilitate communication and service restoration efforts. "Extensive damage to telecommunications infrastructure in this area has occurred, requiring carriers to reroute traffic around damaged facilities to restore service as quickly as possible," the FCC said Sept. 14. "This restoration effort involves the use of other network facilities where sufficient capacity is available and may require the routing of traffic across LATA boundaries that otherwise would be routed within LATA boundaries."



On Sept. 15, FCC Chairman Kevin Martin participated in a meeting to discuss the commission's role in hurricane recovery efforts.

AP/WIDE WORLD PHOTOS

one here. Our cell phone towers and dial tone were down," Boudreaux says.

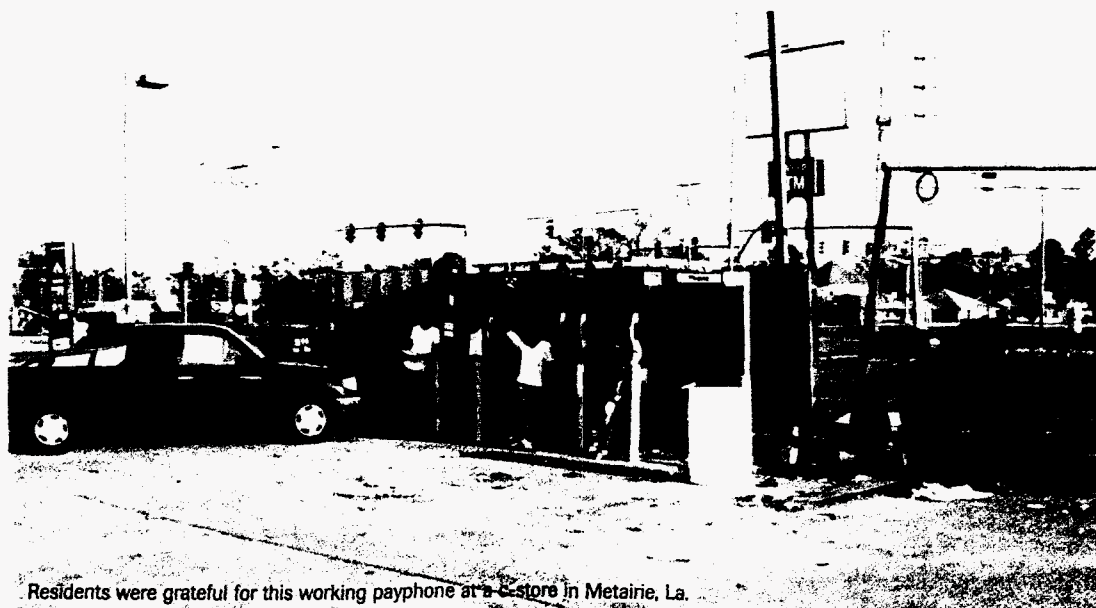
"There's a railroad that runs alongside the Mississippi coast, and it acted much as a dyke in preventing some of the surge from moving farther inland," Boudreaux continues. "Anything within 1,000

yards of the beach is gone — be it building, payphone, whatever. It's like a nuclear bomb went off. The only things left are a few big oak trees that will probably die because all of their bark's been blown off."

The death toll continues to rise as well. As of Sept. 21, the official reported count had passed 1,035, although authorities in the effected states expected the final figures to be well into the thousands. "I saw more than 100 bodies stacked up at the firehouse, and there are 18-wheeler trailers full of bodies," Boudreaux reports.

The death, destruction and uncertainty about the future have made it difficult for many to focus on moving forward.

"We had 150 payphones south of the railroad tracks, and they will be lost for six



Residents were grateful for this working payphone at a store in Metairie, La.

DOSKEY COMMUNICATIONS



◀ Prime Point Media and Ads on Target provided ads that listed the American Red Cross donation number.

only are PSPs having to replace phones, but also some locations are likely gone forever, and working phones in some areas aren't being used at all since people have evacuated. Although he adds that phones in some outlying areas are experiencing high call volumes.

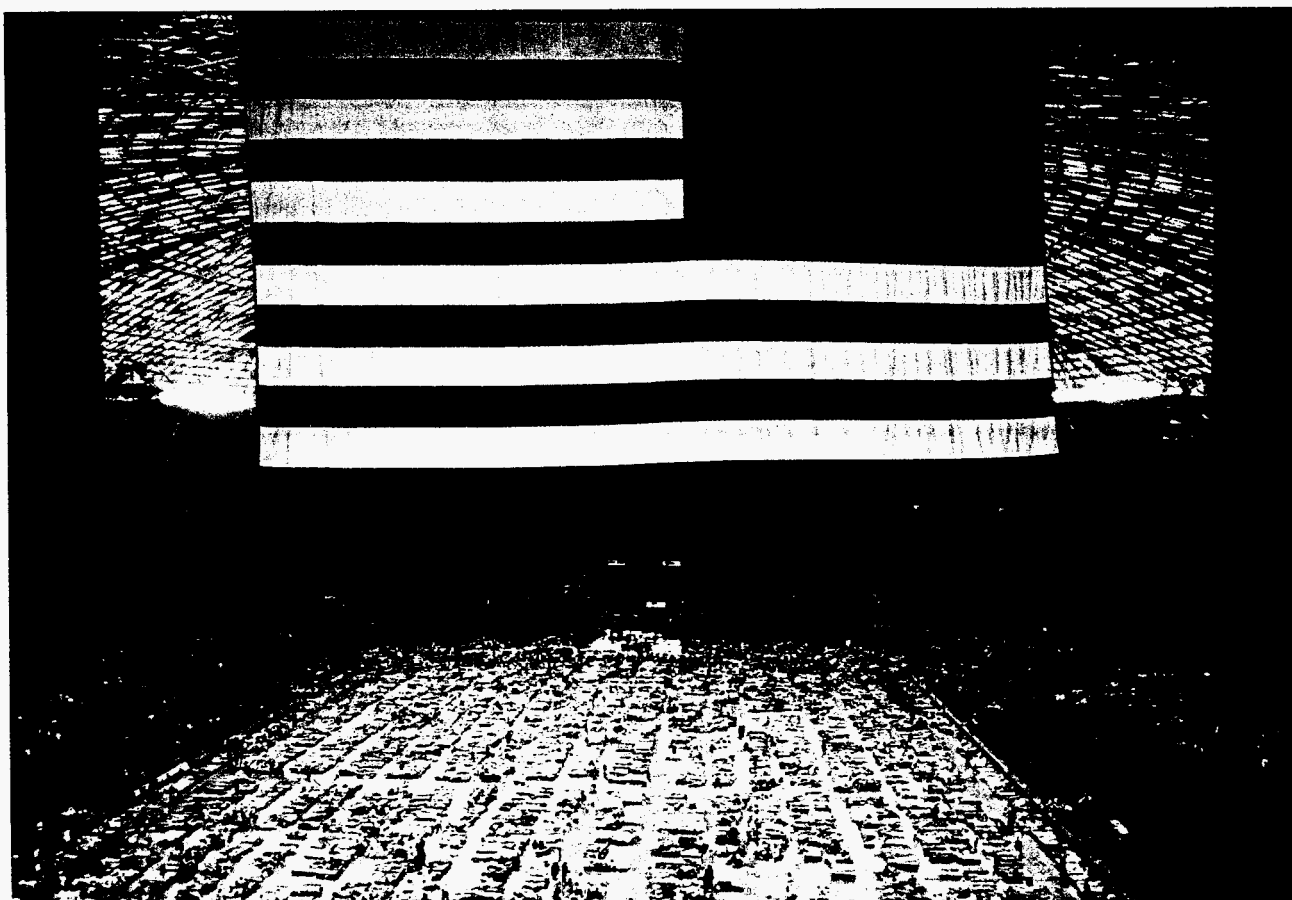
Planning for the future is challenging. "It's frustrating. There's not much we can do," he says. "We don't know who will rebuild and who won't, and how long it will take. The future landscape will look very different, I'm sure. I haven't been able to reach many of our location owners. One lost three c-stores completely. There are just slabs where buildings used to be. He's not sure if he's going to rebuild any of them. People are still in a daze.

"People still don't have water, food, power or anything else," he continues. "I have 16 relatives who have lost their homes living with me and my family indefinitely. We have two techs who live near the coast who have water in their homes and tree damage. We've collected money, water, food and other supplies for them. On Sept. 17, we sent work groups to their homes to surprise them and help them fix their homes and their yards since they've been focusing on trying to fix phones non-stop since Aug. 30," Boudreaux notes.

In addition to fixing its own phones, HSI also has installed cellular payphones at National Guard distribution points where local citizens are going to get food

to 12 months, or possibly forever. It remains to be seen who will rebuild. The concentration of payphones south of the tracks was good in many ways — for example, for service and collections — but now we're seeing the bad side of having a concentration of phones in one area. This is one time when it pays to have a diversified route.

"The days ahead will be hard. I wish we'd had loss of income insurance. We had insurance on the equipment, but not on income. We've tried to see if FEMA is giving any grants, but they're just offering loans at 4 or 5 percent interest rates," Boudreaux says. He notes that not



On Sept. 4, the Houston Astrodome was full of Hurricane Katrina evacuees.

AFWIDE WORLD PHOTOS/CHRISTOPHER MORRIS/VI

and water in four cities along the Mississippi coast. The payphones have an antenna and a solar panel to charge their batteries, and they convert cellular signals into regular dial tone so that the payphone thinks it's on a regular landline. Since the units cost \$1,200 each, and

HSI is paying for cellular service as well, HSI is charging a nominal fee for all calls: 50 cents for 15 minutes anywhere. Boudreaux says each unit has been averaging 20 calls a day, and most callers are contacting insurance companies or FEMA.



HSI Telecommunications gave the LEC an assist by repairing this line.



This close-up shows the temporary repair.

'It's up to us'

In total, some 2,500 payphones in the Gulf Coast region have been without dial tone or completely destroyed due to Katrina, estimates David Cotton, president of the Southern Public Communication Association (SPCA). He notes that payphones that survived the storm intact helped thousands of people reach loved ones and communicate with others during their greatest time of need.

"Once again payphones provided a vital communication link during a national disaster, just like they did during 9/11," Cotton says. "The difference between 9/11 and this situation, though, is that 9/11 was contained to a general area, and phones in that area never lost dial tone. Here, dial tone will be non-existent in many of these areas for weeks to come."

The path of destruction left by Katrina extends over more than 200 miles of coastline and up to 150 miles inland. The National Oceanic and Atmospheric Administration called the hurricane the most destructive storm to ever hit the United States. In fact, the day before Katrina made landfall, the National Weather Service warned that: "Most of the area will be uninhabitable for weeks, perhaps longer. ... At least one-half of well-constructed homes will have roof and wall failure. All gabled roofs will fail, leaving those homes

Helping our own

APCC establishes Katrina Relief Fund to benefit Gulf Coast PSPs

In the days and months ahead, PSPs in southern Louisiana, Mississippi and Alabama will be working to replace thousands of payphones damaged by Hurricane Katrina and the resulting flooding, as well as working to rebuild their homes and communities in wake of the worst storm in history to strike U.S. shores.

To help providers move forward, APCC's Finance Committee has established the APCC Katrina Relief Fund to benefit PSPs effected by the hurricane.

David Cotton, president of the Southern Public Communication Association (SPCA), says, "We're grateful for any help people can provide. The Red Cross helps the masses, and the Katrina Relief Fund will help our own."

Cotton says that APCC and/or SPCA members along the Gulf Coast will receive application forms via e-mail to complete with how many payphones they've lost, the damage sustained, etc. SPCA then will distribute funds gathered by the Katrina Relief Fund to companies based on their needs.



To make a financial contribution to the APCC Katrina Relief Fund, please contact Deborah Sterman at either (800) 868-2722, ext. 226, or via e-mail at dsterman@apcc.net. You may also mail in a payment to: APCC Inc., Attn: Deborah Sterman, 625 Slaters Lane, Ste. 104, Alexandria, VA 22314. Checks should be made payable to the APCC Katrina Relief Fund.

APCC Services customers who wish to have a contribution deducted from their fourth quarter dial-around compensation payment for the APCC Katrina Relief Fund or the American Red Cross General Relief Fund may contact Deborah Sterman via phone or e-mail for the appropriate paperwork.

Equipment assistance

Do you have spare, usable boards, handsets, keypads or other spare parts sitting in inventory? Consider sending them to regions hit hard by Katrina.

APCC has established the Katrina Equipment Bank to match donated payphone parts with the APCC and/or SPCA member companies along the Gulf Coast that need them.

In addition, in California, Bill Goltman, president of West Coast Communication Services in Mission Viejo, has set up his own relief effort. Goltman lost a number of his payphones in Laguna Beach to mudslides last year. Therefore, he sympathizes with payphone providers in the Gulf Coast region who have lost hundreds of their phones to Katrina's wind and rain, and the resulting mud and flooding.

"I'm not the cavalry. I'm only a little guy on a pony out here, but I've downsized my route a bit over the years, and I have a lot of good, working

scrapped parts that I know people could use. There have to be lots of people like me with inventory that's usable," Goltman says.

Goltman is encouraging his fellow California PSPs to contact him with a list of parts they have available to donate. Goltman will work with the Southern Public Communication Association (SPCA) to match needs with available parts.

Goltman can be reached at pitkitty@cox.net.

PSPs in other parts of the country who wish to donate payphone parts or entire working payphones should contact Deborah Sterman at (800) 868-2722, ext. 226 or via dsterman@apcc.net or www.apcc.net.

severely damaged or destroyed. ... Power outages will last for weeks. ... Water shortages will make human suffering incredible by modern standards."

During this desperate time, payphone service providers are standing strong, working to rebuild their businesses and their lives. Cotton expects them to prevail. "Remember that BellSouth is no longer in the payphone business," he says. "There is no LEC [local exchange carrier] to rescue us. It's up to us to replace and provide this valuable tool for the public. SPCA, working with APCC and the payphone industry, will seek federal assistance and help from FEMA to get this important public service back in place."

Willard R. Nichols, president of APCC, was optimistic: "Government policy makers have in the past shown a real understanding of the importance of payphones in the American communications infrastructure. The critical and truly vital role that public payphones play, particularly in times of emergency and crisis, is something all payphone service providers should take pride in. Knowing that their payphones were once again the first and last opportunity for so many to communicate in the face of these storms is a testament to the profound importance of the services they continue to provide to the American public." ■



This Mid City Payphone phone, at 1201 Royal Street in the French Quarter, worked throughout the storm and afterward. Residents used it as a message board center, and someone placed a Bible in the enclosure.



HSI Telecommunications placed several cellular payphones at National Guard distribution points; this one is in Biloxi, Miss.

Munnerlyn, Carol J.

From: Harlow, Brooks
Sent: Thursday, November 17, 2005 1:02 PM
To: 'Russell.Hanser@fcc.gov'
Subject: CC Docket No. 96-128

Attached, as you requested, are copies of the comments on two of the three pending petitions filed by the Northwest Public Communications Council in Docket 96-128.

Thank you again for your time this morning.



NPCC- FCC



NPCC- Comments

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

)	
)	
In the Matter of)	
)	CC Docket No. 96-128
Implementation of the Pay Telephone)	
Reclassification and Compensation)	
Provisions of the Telecommunications Act of)	
1996)	
)	
The Illinois Public Telecommunications)	
Association's Petition for a Declaratory)	
Ruling Regarding the Remedies Available)	
for Violations of the Commission's)	
Payphone Orders.)	

**COMMENTS OF THE NORTHWEST PUBLIC COMMUNICATIONS COUNCIL,
THE MINNESOTA INDEPENDENT PAYPHONE ASSOCIATION,
AND THE COLORADO PAYPHONE ASSOCIATION
IN SUPPORT OF PETITION FOR A DECLARATORY RULING**

The Northwest Public Communications Council, the Minnesota Independent Payphone Association, and the Colorado Payphone Association ("Associations") support the Illinois Public Telecommunications Association's ("IPTA") petition for a declaratory ruling. IPTA is correct that payphone service providers ("PSPs") are entitled to refunds where regional Bell operating companies ("RBOC") like SBC Illinois and Verizon¹ overcharge PSPs for payphone services under the new services test, and state commissions are preempted from

¹ These comments refer to Verizon as an RBOC because Verizon is the successor to former RBOCs NYNEX and Bell Atlantic as well as non-RBOC GTE and because the Illinois Commerce Commission applied the new services test to Verizon's rates. ICC Order, infra, at 21.

holding otherwise. IPTA is also correct that SBC Illinois and Verizon illegally collected dial around compensation for years without meeting the requirement that they must first set their rates according to the new services test. Long experience shows that state commissions and RBOCs will not implement these FCC requirements unless the FCC demonstrates that it will enforce them. A declaratory ruling directing all RBOCs either to refund new services overcharges to PSPs back to April 15, 1997 or to refund DAC to interexchange carriers ("IXC") is the best mechanism to achieve this result.

I. THE TELECOMMUNICATIONS ACT PREEMPTS STATE COMMISSIONS LIKE THE ILLINOIS COMMERCE COMMISSION FROM BARRING FCC-REQUIRED REFUNDS BASED ON STATE LAW

In 1997, the FCC issued an order mandating that that local exchange carriers ("LECs") such as RBOCs that relied on a waiver of certain tariff filing requirements must refund PSPs for overcharges where their rates filed in compliance with the new services test exceed their old, noncompliant rates:

A LEC who seeks to rely on the waiver granted in the instant Order must reimburse its customers or provide credit from April 15, 1997 in situations where the newly tariffed rates, when effective, are lower than the existing tariff.

See Order, 12 FCC Rcd 21,370 at ¶ 25 (1997) ("1997 Refund Order") (emphasis added).

Based on the 1997 Refund Order, the IPTA asked the Illinois Commerce Commission ("ICC") to hold that SBC Illinois and Verizon (which relied on the above waiver) charged PSPs payphone services rates above the new services test limit and that SBC Illinois and Verizon should refund the overcharges to the PSPs. See IPTA Petition at 11. The ICC issued an order in 2003 holding that SBC Illinois and Verizon illegally overcharged the PSPs but refused to award refunds to IPTA because it would be "contrary to Illinois law" to order refunds, given that Illinois law prohibits refunds where rates have already been reviewed and approved by the

ICC. Interim Order, Docket No. 98-0195 at 43 (Nov. 12, 2003)(“ICC Order”); see IPTA Petition at 6. This is known as the prohibition against “retroactive ratemaking” or the “filed rate doctrine.”

The Telecommunications Act and related FCC orders preempt the ICC Order's holding that the ICC could not order refunds under Illinois state law. Section 276 of the Telecommunications Act states that FCC regulations preempt contrary state law:

[T]o the extent that any State requirements are inconsistent with the Commission’s regulations, the Commission’s regulations on such matters shall preempt such State requirements.

47 U.S.C. § 276(c); Memorandum Opinion and Order, 17 FCC Rcd 2,051 at ¶ 7 (2002) (“New Services Order”). Pursuant to this section, the FCC held that any state regulation that prevents the implementation of cost based rates in compliance with the new services test, effective no later than April 15, 1997, was inconsistent with the federal law and preempted. Report and Order, 11 FCC Rcd 20,541 at ¶ 147 (1996)(“1996 Report and Order”). The FCC’s new services test requirements developed in its payphone orders were “implemented pursuant to section 276(b)(1) and would fall within the scope of the preemption provision.” New Services Order at ¶ 38. So, if the ICC concluded that the FCC’s refund mandate based on the new services test was contrary to Illinois law, then the FCC’s mandate preempts Illinois law, not the other way around.

The ICC argues that the U.S. Supreme Court’s decision in Arizona Grocery Co. v. Atchison, 284 U.S. 370 (1932) also prohibits the ICC from awarding refunds, but Arizona Grocery involved different facts. In that case, the Supreme Court prohibited the Interstate Commerce Commission, a federal agency, from engaging in retroactive ratemaking under federal

law based on federally-filed tariffs. Id. at 381, 389. That is different from the Illinois Commerce Commission, a state agency, attempting to void an order of the FCC, a federal agency, based on state-filed tariffs. In sum, the Telecommunications Act and the FCC's orders preempt the Illinois law, and the FCC should so state in a declaratory ruling.

II. SBC ILLINOIS AND VERIZON ILLEGALLY COLLECTED DIAL AROUND COMPENSATION BECAUSE THEIR RATES VIOLATED THE NEW SERVICES TEST

In 1997 the FCC held that LECs, which includes RBOCs, cannot legally collect dial around compensation until they set their payphone services rates according to the new services test. LECs "will be eligible for [dial around] compensation like other PSPs when they have completed the requirements for implementing our payphone regulatory scheme to implement Section 276:"

To receive compensation a LEC must be able to certify the following: . . . it has in effect intrastate tariffs for basic payphone services (for "dumb" and "smart" payphone); and . . . it has in effect intrastate and interstate tariffs for unbundled functionalities associated with those lines.

Order on Reconsideration, 11 FCC Rcd 21,233 at ¶ 131 (1997)(emphasis added). One of those requirements was that the intrastate tariffs described above must be set according to the "new services test required in the [1996] Report and Order [and] described at 47 C.F.R. § 61.49(g)(2)." Id. at ¶ 163 and n. 492. The FCC directed state commissions to determine whether RBOC rates met the new services test. Id. at ¶ 163.

The ICC Order concluded in November 2003 that "neither SBC's nor Verizon's existing rates are in compliance with the NST" or new services test. ICC Order at 46. Because SBC Illinois and Verizon's payphone rates did not comply with the new services test, SBC Illinois and Verizon could not legally collect dial around compensation. Yet SBC Illinois and

Verizon have collected “hundreds of millions of dollars” (Petition at 2) of dial around compensation anyway over the past several years. SBC Illinois and Verizon’ self-certification in 1997 that their rates complied with the new services test provides no protection, as self-certification is no substitute for actual compliance as determined by state commissions.

Now that the ICC concluded that SBC Illinois and Verizon have not complied with the new services test, the FCC must issue a declaratory ruling stating that SBC Illinois and Verizon must either return the DAC to the IXC’s who paid it or pay refunds for new services test overcharges to PSPs. If the FCC does not do so, it will effectively repeal a requirement established in a rulemaking without giving parties notice and an opportunity for comment, which the Administrative Procedure Act prohibits. 5 U.S.C. § 553(b).

III. CONCLUSION

SBC Illinois and Verizon, as well as other RBOCs, for years illegally failed to set their payphone services rates according to the new services test, illegally failed to refund overcharges to PSPs when they finally filed compliant rates, and illegally collected dial around compensation the entire time. The FCC has emphasized that actual compliance with the new services test was required under the FCC’s orders. As stated in IPTA’s Petition, the ICC found that neither SBC nor Verizon were in actual compliance, yet the ICC still failed to enforce these federal requirements for the time period from April 15, 1997 through December 13, 2003. SBC and Verizon violated FCC orders both (1) through failing to provide rates in compliance with the new services test rates effective April 15, 1997, and (2) by collecting DAC without complying with the FCC’s condition precedent for eligibility. The FCC imposed both requirements for the express purpose of ensuring that PSPs would receive cost-based rates no later than April 15, 1997. Illinois, and some other states, have failed to implement these requirements. Yet still

other states have implemented the FCC's orders and required refunds to PSPs. Enforcement of the same federal rights have ended in irreconcilably inconsistent results depending on in which state the PSP has payphones.

It is time for the FCC to end this game. A declaratory ruling like that described by IPTA is the best remedy. The FCC needs to address the uniform enforcement of its own orders by declaring that RBOCs must either refund to PSPs any rates in excess of the lawful rates or to return illegally collected DAC, and to order such other relief as the FCC deems appropriate.

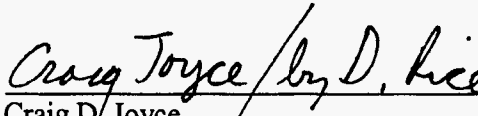
DATED this 26th day of August, 2004.

Respectfully submitted,



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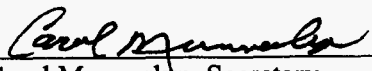
CERTIFICATE OF SERVICE

FCC Docket No. 96-128

I hereby certify that a true and correct copy of the Comments of the Northwest Public Communications Council, the Minnesota Independent Payphone Association, and the Colorado Payphone Association In Support of Petition for a Declaratory Ruling has been sent electronically and by first-class U.S. Mail to the following:

Michael W. Ward
Michael W. Ward, P.C.
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Buffalo Grove, Illinois 60089
E-mail: mwward@dnsys.com

DATED this 26th day of August, 2004.


Carol Munnerlyn, Secretary

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of

Implementation of the Pay Telephone
Reclassification and Compensation
Provisions of the Telecommunications Act of
1996

Independent Payphone Association Of New
York's Petition For Pre-Emption And
Declaratory Ruling Concerning Refund Of
Payphone Line Rate Charges

CC Docket No. 96-128

**COMMENTS OF THE NORTHWEST PUBLIC COMMUNICATIONS COUNCIL AND
THE MINNESOTA INDEPENDENT PAYPHONE ASSOCIATION,
IN SUPPORT OF PETITION FOR A DECLARATORY RULING**

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Independent Payphone Association

Dated: January 18, 2005

SEADOCs:194751.1

The Northwest Public Communications Council and the Minnesota Independent Payphone Association ("Associations") support the petition of the Independent Payphone Association Of New York ("IPANY") for a declaratory ruling.¹

Apart from ensuring that IPANY members receive the refunds they are due, it is critically important for two policy reasons that the Commission grant the IPANY petition. First, if the Commission fails to effectively enforce its orders and policies, that will give all the companies it regulates strong incentives to "see what they can get away with." Second, regrettably Verizon is not the only RBOC that delayed compliance with the Commission's New Services Test ("NST") pricing requirements for seven years by using and *abusing* state regulatory and appellate processes. Like Verizon, Qwest delayed NST compliance from 1997 until 2002, 2003—and beyond—and steadfastly refused to refund the millions of dollars it overcharged the Associations' members for all those years. The Qwest state commissions and appellate courts could benefit greatly from the FCC's proper interpretation of its orders that would result from granting IPANY's petition

I. GRANTING IPANY'S PETITION WOULD ENSURE THAT REGULATED COMPANIES DO NOT GET THE MESSAGE THAT IGNORING OR MISINTERPRETING COMMISSION ORDERS CAN BE REWARDING.

In deciding whether to address and grant IPANY's petition, the Commission needs to ask, what message does it want to send to the RBOCs and other companies it regulates? Like the IRS, the FCC relies almost entirely on voluntary compliance with its rules and orders by the industries it regulates. These industries are both savvy and motivated by their own financial interests. If they perceive that the Commission will allow them to delay or

¹ The Associations also support the petitions of the IPTA and the SPCA, filed earlier in 2004. The Associations filed comments on the IPTA petition on August 26, 2004, which are incorporated herein by reference in further support of the IPANY petition.

avoid entirely the implementation of Commission's *Payphone Orders*² that have a negative financial impact, they will behave accordingly in the future. That is precisely the situation implicated by the IPANY petition.

Verizon, Qwest, and the other RBOCs were ordered to file or seek approval of their payphone access line ("PAL") rates with the states in early 1997. Rather than file the substantial rate reductions that the NST required, Qwest and Verizon instead decided to first ignore the NST or to mislead state commissions regarding the requirements of the NST. Later they decided to challenge the Commission's interpretation of the NST and its authority to require cost-based tariffs—a battle the RBOCs lost. *New England Public Comm. Coun. v. F.C.C.*, 334 F.3d 69, 72-74 (D.C. Cir. 2003) (explaining the tortured history of those challenges).³ Thus, through artful dodging and direct and collateral challenges to the Commission's orders that continued until 2003, the RBOCs enjoyed at least six years of unlawful and excessive rates at the expense of their payphone service provider ("PSP") competitors. If the RBOCs are not ordered to pay refunds retroactive to April 15, 1997, they will succeed in benefiting from either their intentional violation of the Commission's orders or (to be charitable) their erroneous interpretation of those orders.

² *In the Matter of the Implementation of the Pay Telephone Reclassification And Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order, 11 FCC Rcd. 20541, ¶¶146-147 (1996) ("First Payphone Order"), and Order on Reconsideration, 11 FCC Rcd. 21233 (1996), ¶¶131, 163 ("Payphone Reconsideration Order") *aff'd in part and remanded in part sub nom. Illinois Pubic Telecommunications Assn. v. FCC*, 117 F.3d 555 (D.C. Cir. 1997), *clarified on rehearing* 123 F.3d 693 (D.C. Cir. 1997) *cert. den. sub nom. Virginia State Corp. Com'n. v. FCC*, 523 U.S. 1046 (1998); Order, DA 97-678, 12 FCC Rcd. 20997, ¶¶ 2, 30-33, 35 (Com. Car. Bur. released April 4, 1997) ("Waiver Order"); Order, DA 97-805, 12 FCC Rcd. 21370, ¶ 10 (Com. Car. Bur. released April 15, 1997) ("Refund Order") (collectively "*Payphone Orders*").

³ On May 13, 2002, Qwest, along with other RBOCs and LECs, definitively lost their second facial challenge to the FCC's authority to require state commissions to establish cost-based tariffs. *Verizon Communications, Inc. v. F.C.C.*, 535 U.S. 467 (2002).

Whether the RBOCs intentionally twisted the Commission's orders or acted in good faith, the signal that denying refunds would send is the same. There is huge benefit to be gained from "seeing what you can get away with" and no downside. Even a refund order is a relatively mild remedy. It has no punitive element whatsoever. It merely restores the PSPs and RBOCs to the financial position that the Commission intended all along would exist effective April 15, 1997.

II. OTHER RBOCS SUCH AS QWEST CONTINUE TO TRY TO USE STATE LAW PRINCIPLES TO CONVINCE STATE COMMISSIONS TO DENY THE REFUNDS THAT THIS COMMISSION ORDERED.

A. Like Verizon, Qwest fought NST-compliant PAL rates and now fights the Commission ordered refunds.

The Associations fully support the IPANY petition because they understand first hand how difficult it is to force an RBOC to comply with the NST at a state commission. The RBOCs simply did not or do not want to file compliant rates. Now they do not want to issue refunds. Unfortunately, as this Commission has noted in the past, state commissions have struggled to interpret and enforce the Commission's *Payphone Orders*.⁴ The Commission's *Wisconsin Order* was invaluable to the states in getting some of the RBOCs, such as Qwest, to finally comply with the NST. But Qwest and others continue to fight refunds, tooth and nail, using many of the same state laws and procedures that they used to delay NST compliance for so many years. Qwest's actions in Oregon, discussed below, are a prime example.

⁴ *In the Matter of Wisconsin Public Service Commission: Order Directing Filings*, Bureau/CPD No. 00-01, Memorandum Opinion and Order, FCC 02-25, 17 FCC Rcd. 2051, ¶ 2 and Note 10 (Jan. 31, 2002) ("Wisconsin Order") *aff'd sub nom. New England Public Communications Council, Inc. v. FCC*, 334 F.3d 69 (D.C. Cir. 2003).

The RBOCs need the Commission to tell them—*again*—that they must pay refunds from the date of compliance with the NST back to April 15, 1997. Hopefully the RBOCs will stop fighting refunds in the states and will voluntarily comply. If not, at least the FCC's order will provide helpful guidance to the state commissions and appellate courts, which are still struggling with the RBOC's arguments that misinterpret the letter and spirit of the Commission's orders.

B. Verizon's arguments to the New York tribunals that are contrary to the Commission's orders are similar to Qwest's ongoing arguments to the Oregon PUC to disregard Federal law and follow state law.

The tortured path the Payphone Service Providers ("PSPs") have been forced to travel in New York seems almost too incredible to be anything but a bad fiction novel. Yet it is virtually the same path that PSPs in Oregon have had to take. Like the PSPs in New York, PSPs in Oregon have had to contend with delays and continual litigation against Qwest from 1996 to date—over eight years—to get Qwest to comply with the NST. As Verizon misled the New York PSC, Qwest for years misled the Oregon PUC on application of the Commission's *Payphone Orders* and NST. Finally, on November 10, 2004, the Oregon Court of Appeals put an end to Qwest's artful dodging, reversing the OPUC for its failure (at Qwest's strong urging) to follow federal law.⁵

While the OPUC has yet to approve a PAL rate for Qwest as complying with the NST—nearly eight years after Qwest was supposed to have complied with it—indications are that Qwest over charged PSPs for PAL service by between \$20 and \$50 per line per month

⁵ *Northwest Public Comm's Council v. PUC*, 196 Ore. App. 94, 100 P.3d 776 (2004). The time for Qwest to further appeal has run, making the decision final. However, the case will still have to be remanded to the OPUC for a final determination of compliant Public Access Line (PAL) rates. Thus, when this matter is finally concluded, it will have been eight or more years that Qwest's compliance with the NST will have been delayed in Oregon from the FCC's intended implementation date of April 15, 1997.

from April 15, 1997 through March 2003. In 1997 Qwest charged up to \$60 per month or more⁶ for PAL service. For most of 1998 to 2003, Qwest charged about \$30 for PAL service. In 2003, Qwest slashed its Oregon PAL rate to under \$10, alleging that the new rate complied with the NST. Thus, for seven years Qwest charged PSPs three times to six times the rate it should have been charging under the NST.

While the PSPs in Oregon are finally on the brink of obtaining an order from the OPUC that establishes what Qwest's PAL rates must be and should have been to comply with the NST, Qwest steadfastly refuses to honor its obligation to pay refunds once the rates are set. In a pending motion for summary judgment on the refund issue,⁷ Qwest argues at length to the OPUC that the OPUC should follow the decision of the New York PSC and courts. The rest of Qwest's brief argues the same faulty rationale that the New York tribunals used to deny refunds. For example, Qwest argues that "Oregon law" prohibits a refund. Qwest argues that state law principals of "filed rate doctrine," "res judicata," and "standing" bar the NPCC from enforcing federal law requiring refunds. These state-law based defenses should have no relevance to the state proceedings relating to NST-compliance and refunds because of Federal pre-emption. As the NPCC and MIPA discussed in their August 26, 2004 comments in this docket, state laws (including state tariffs) that frustrate or block implementation of Section 276 and the FCC's orders were expressly pre-empted by Congress and the FCC.

⁶ Until late 1997, Qwest imposed mandatory measured service on PSPs in Oregon with exorbitant usage charges, meaning that there was almost no upward limit to the PAL rate.

⁷ The NPCC's refund complaint is a separate docket from Qwest's rate case. The NPCC has sought a partial summary judgment on liability only, with refunds to be determined after the OPUC sets a final PAL rate on remand from the Court of Appeals.

Even though Qwest's years of reliance on state law doctrines that Congress and this Commission pre-empted was struck down just two months ago by the Oregon Court of Appeals as to going-forward PAL rates, on refunds Qwest is once again trying to lead the OPUC astray. Qwest is misinterpreting this Commission's orders and urging the OPUC to apply state law doctrines to override the Commission's orders. The Commission's guidance on NST compliance going forward was extremely helpful to the states. In Qwest's 14 states, the *Wisconsin Order* led to PAL rate reductions averaging about 50% to as much as about 70% within a year after the order was issued. By giving guidance on refunds, the Commission might similarly help to bring resolution to this contentious issue within a reasonable timeframe.

In short, IPANY's problems with Verizon are not unique. The NPCC trusts that OPUC will not so easily be led astray by Qwest after so recently having been reversed by the Court of Appeals. And the NPCC will continue to litigate against Qwest in Oregon for as long as necessary. However, without FCC guidance, that could be a long time. Assuming the NPCC prevails at the OPUC on refunds, Qwest is likely to appeal, since Qwest has shown no sign of relenting and Qwest's refund obligation is estimated to be in excess of \$6 million in Oregon. Accordingly, the NPCC believes that if this Commission grants IPANY's petition, it would be very helpful in ensuring that refund disputes in Oregon and other states are resolved quickly. Possibly Qwest would finally relent based on clear guidance from the Commission. At a minimum, the Oregon PUC and courts would be able to quickly (and correctly) dispense with Qwest's spurious arguments.

III. QWEST'S AND VERIZON'S ARGUMENTS THEY DID NOT "RELY" ON THE WAIVER ORDER COMPLETELY MISCONSTRUE THE ORDER AND FRUSTRATE THE COMMISSION'S GOAL OF ELIMINATING DISCRIMINATION AS REQUIRED BY SECTION 276.

The New York court agreed with Verizon that Verizon did not rely on the *Refund Order* because Verizon failed to file new PAL rates between April 15 and May 19, 1997. Qwest is currently making the same argument in Oregon. This interpretation thwarts the Commission's essential purpose of implementing Section 276 in its *Payphone Orders*. Specifically, the Commission intended that all the financial provisions of the *Payphone Orders* were to be in place *effective* on April 15, 1997. The NST pricing requirement was an essential part of the entire scheme. Unless and until the RBOCs priced their PAL services based on cost—as established under the NST—the RBOCs would be continuing to discriminate against the PSPs in violation of Section 276(a)(2) and (b)(2)(C).

In order to ensure that the RBOCs took their obligations under the NST seriously and would comply with the pricing requirement, the Commission made compliance with the NST an express prerequisite to receiving dial around compensation ("DAC"). The *Waiver Order* and the *Refund Order* were not intended to upset this important balance and incentive scheme. Rather, the FCC "emphasized" that compliance in fact with the NST remained a prerequisite to the RBOC's entitlement to DAC. *Waiver Order*, ¶ 30 and *Refund Order*, ¶ 10. Since Verizon failed to file NST compliant rates by April 15, 1997, the only way that the Commission can ensure that Verizon's PAL rates in New York complied with the NST effective on April 15, 1997, is to grant IPANY's petition and order refunds retroactive to that date.

The RBOCs all started collecting DAC on April 15, 1997 based on the premise that payphone providers would not be harmed:

[C]ompeting PSPs will suffer no disadvantage. Indeed, the voluntary reimbursement mechanism discussed above – which ensures that PSPs are compensated if rates go down, but does not require them to pay retroactive additional compensation if rates go up – will ensure that no purchaser of payphone services is placed at a disadvantage due to the limited waiver.

RBOC Coalition Waiver Request Letter, April 11, 1997 (emphasis added). The effect of denial of refunds is to render this promise hollow and unfulfilled. Again, using Oregon as an example, Qwest will have charged its PSP competitors a rate of up to six times or more the rate it charged itself in 1997. From 1998 through 2003, Qwest will have charged itself three times the rate it charged itself. Discrimination of such a magnitude, for so many years, cannot possibly be reconciled with the RBOC's assertion that the PSPs "would not be placed at a disadvantage" due to the waiver. Only by ordering refunds can the discrimination be ameliorated.

The interpretation of what it meant to rely on or "take advantage" of the *Waiver Order* advocated by Qwest and Verizon and adopted by the New York Court of Appeals prevents implementation of key provisions of Section 276 of the Act until many years after April 15, 1997, in contravention of all of the Commission's *Payphone Orders*. The only interpretation of the *Refund Order* that will have the effect of timely implementing Section 276 is that an RBOC that did not have NST-compliant rates on April 15, 1997 but began collecting DAC effective on that date, "relied" on the *Refund Order* and must pay refunds retroactive to that date whenever new tariffs first found to comply with the NST take effect.

CONCLUSION

It is time for the FCC to end Qwest's and Verizon's charade. The Commission should ensure uniform enforcement of its *Payphone Orders* by declaring that RBOCs must

either refund to PSPs any rates in excess of the lawful rates or to return illegally collected dial
around compensation, retroactive to April 15, 1997.

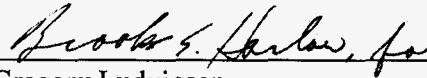
DATED this 18th day of January, 2005.

Respectfully submitted,



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CERTIFICATE OF SERVICE
CC Docket 96-128

I hereby certify that I have this day caused to be mailed by U.S. Mail, postage prepaid a true and correct copy of the Comments Of The Northwest Public Communications Council And The Minnesota Independent Payphone Association, In Support Of Petition for a Declaratory Ruling addressed to the following:

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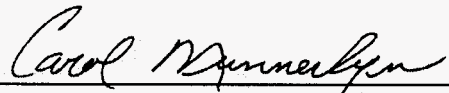
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Dated this 18th day of January, 2005.



Carol Munnerlyn, Secretary

Munnerlyn, Carol J.

From: Harlow, Brooks
Sent: Thursday, November 17, 2005 12:56 PM
To: 'scott.Bergmann@fcc.gov'
Subject: FCC Waiver Order

Attached is the FCC's April 15, 1997 "Refund" order, as you requested.

Thank you for your time this morning. Please let me know if there are any other documents or information that I can provide.

Brooks E. Harlow
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FCC Waiver
Order.pdf (712 KB)

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

DA 97-805

In the Matter of)	
)	
Implementation of the)	CC Docket No. 96-128
Pay Telephone Reclassification)	
and Compensation Provisions of the)	
Telecommunications Act of 1996)	

ORDER

Adopted: April 15, 1997

Released: April 15, 1997

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order, the Common Carrier Bureau ("Bureau") grants a limited waiver of the Commission's requirement that effective intrastate tariffs for payphone services be in compliance with federal guidelines, specifically that the tariffs comply with the "new services" test, as set forth in the Payphone Reclassification Proceeding, CC Docket No. 96-128.¹ Local exchange carriers ("LECs") must comply with this requirement, among others, before they are eligible to receive the compensation from interexchange carriers ("IXCs") that is mandated in that proceeding.²

2. Because some LEC intrastate tariffs for payphone services are not in full compliance with the Commission's guidelines,³ we grant all LECs a limited waiver until May 19, 1997 to file intrastate tariffs for payphone services consistent with the "new services" test, pursuant to the

¹ For purposes of this Order, the term "intrastate tariff" refers to a tariff filed in the state jurisdiction and the term "interstate tariff" refers to a tariff filed in the federal jurisdiction. Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Report and Order, FCC 96-388 (rel. Sept. 20, 1996) ("Payphone Order"); Order on Reconsideration, FCC 96-439 (rel. Nov. 8, 1996) ("Order on Reconsideration"), appeal docketed sub nom. Illinois Public Telecommunications Assn. v. FCC and United States, Case No. 96-1394 (D.C. Cir., filed Oct. 17, 1996) (both orders together "Payphone Reclassification Proceeding").

² Order on Reconsideration at paras. 131-132.

³ Id. at para. 163.

federal guidelines established in the Order on Reconsideration, subject to the terms discussed herein.⁴ This waiver enables LECs to file intrastate tariffs consistent with the "new services" test of the federal guidelines detailed in the Order on Reconsideration and the Bureau Waiver Order,⁵ including cost support data, within 45 days of the April 4, 1997 release date of the Bureau Waiver Order and remain eligible to receive payphone compensation as of April 15, 1997, as long as they are in compliance with all of the other requirements set forth in the Order on Reconsideration.⁶ Under the terms of this limited waiver, a LEC must have in place intrastate tariffs for payphone services that are effective by April 15, 1997. The existing intrastate tariffs for payphone services will continue in effect until the intrastate tariffs filed pursuant to the Order on Reconsideration and this Order become effective. A LEC who seeks to rely on the waiver granted in the instant Order must reimburse its customers or provide credit from April 15, 1997 in situations where the newly tariffed rates, when effective, are lower than the existing tariffed rates. This Order does not waive any of the other requirements with which the LECs must comply before receiving compensation.

3. The Bureau takes this action, in response to a request by the RBOC Coalition⁷ and Ameritech, pursuant to the authority delegated to it by the Commission in the Order on Reconsideration to determine whether a LEC has met the requirements of the Payphone Reclassification Proceeding prior to receiving compensation.⁸ The instant Order advances the twin goals of Section 276 of the Act by promoting both competition among payphone service providers ("PSPs") and the widespread deployment of payphone services to the benefit of the general public.⁹

II. BACKGROUND

4. In the Payphone Reclassification Proceeding, the Commission noted that Telecommunications Act of 1996 fundamentally changed telecommunications regulation. It stated

⁴ Id. This Order does not waive any of the other federal guidelines for intrastate payphone service tariffs. See para. 10, below.

⁵ Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Order, DA 97-678 (Com. Car. Bur., rel. Apr. 4, 1997) ("Bureau Waiver Order").

⁶ Order on Reconsideration at paras. 131-132. The Bureau Waiver Order modified these requirements slightly by granting all LECs a limited waiver of the deadline for filing the federal tariffs for unbundled features and functions, to the extent necessary, to enable LECs to file the required federal tariffs within 45 days after the April 4, 1997 release date of that order, with a scheduled effective date no later than 15 days after the date of filing. The Bureau also waived the requirement, for a period of 60 days from the release date of Bureau Waiver Order, that these interstate tariffs for unbundled features and functions be effective before the LECs are eligible to receive payphone compensation. Bureau Waiver Order at paras. 20-23.

⁷ The RBOC Coalition consists of all of the Bell Operating Companies ("BOCs") except Ameritech. This Order uses the term "RBOC Coalition" to refer to the petitioners requesting the waiver, which includes Ameritech.

⁸ Order on Reconsideration at para. 132. See also id. at para. 163. These delegations of authority to the Bureau are consistent with Section 0.91 of the Commission's rules, 47 C.F.R. § 0.91.

⁹ 47 U.S.C. § 276(b)(1).

that the 1996 Act erects a "pro-competitive deregulatory national framework designed to accelerate rapid private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."¹⁰ To that end, the Commission advanced the twin goals of Section 276 of the Act of "promot[ing] competition among payphone service providers and promot[ing] the widespread deployment of payphone services to the benefit of the general public. . .".¹¹ It sought to eliminate those regulatory constraints that inhibit the ability both to enter and exit the payphone marketplace, and to compete for the right to provide services to customers through payphones. At the same time, the Commission recognized that a transition period is necessary to eliminate the effects of some long-standing barriers to full competition in the payphone market. For this reason, it concluded that it would continue, for a limited time, to regulate certain aspects of the payphone market, but only until such time as the market evolves to erase these sources of market distortions.¹²

5. In the Payphone Order, the Commission concluded that, consistent with Section 276 of the Act, PSPs are to be compensated for "each and every completed intrastate and interstate call" originated by their payphones.¹³ For the first year of the compensation provided by the Payphone Order, the Commission required those IXCs with annual toll revenues in excess of \$100 million to pay PSPs proportionate shares, based on their respective market shares, of interim, flat-rated compensation in the amount of \$45.85 per payphone per month.¹⁴ This monthly amount is to compensate each payphone for an average of 131 access code calls and subscriber 800 calls. The Commission concluded that LEC PSPs would be eligible to receive this compensation by April 15, 1997, once the LEC, among other things, terminated certain subsidies flowing to its payphone operations.¹⁵

6. In the Order on Reconsideration, the Commission concluded that to be eligible to receive compensation, a LEC must be able to certify the following:

1) it has an effective cost accounting manual ("CAM") filing; 2) it has an effective interstate CCL tariff reflecting a reduction for deregulated payphone costs and reflecting additional multiline subscriber line charge ("SLC") revenue; 3) it has effective intrastate tariffs reflecting the removal of charges that recover the costs of payphones and any intrastate subsidies; 4) it has deregulated and reclassified or transferred the value of payphone customer premises equipment ("CPE") and related

¹⁰ S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996).

¹¹ 47 U.S.C. § 276(b)(1).

¹² Payphone Order at paras. 11-19.

¹³ Id. at paras. 48-76.

¹⁴ Id. at paras. 119-126.

¹⁵ Order on Reconsideration at para. 131.

costs as required in the Report and Order; 5) it has in effect intrastate tariffs for basic payphone services (for "dumb" and "smart" payphones); and 6) it has in effect intrastate and interstate tariffs for unbundled functionalities associated with those lines.¹⁶

In addition, the Commission clarified "that the requirements of the Report and Order apply to inmate payphones that were deregulated in an earlier order."¹⁷

7. The Commission also applied additional requirements to those LECs that are BOCs:

In addition to the requirements for all other LECs, BOCs must also have approved [comparably efficient interconnection ("CEI")] plans for basic payphone services and unbundled functionalities prior to receiving compensation. Similarly, prior to the approval of its [CEI] plan, a BOC may not negotiate with location providers on the location provider's selecting and contracting with the carriers that carry interLATA calls from their payphones.¹⁸

8. In the Order on Reconsideration, the Commission concluded that where LECs have already filed intrastate tariffs for payphone services, states may, after considering the requirements of the Order on Reconsideration, the Payphone Order, and Section 276, conclude: (1) that existing tariffs are consistent with the requirements of the Payphone Order, as revised in the Order on Reconsideration, and (2) that in such case no further filings are required.¹⁹

III. LIMITED WAIVER PERTAINING TO STATE TARIFFING REQUIREMENTS

A. Background

9. The Commission concluded in the Order on Reconsideration that LECs are required to tariff basic payphone lines (smart, dumb, and inmate) at the state level only.²⁰ Unbundled features and functions provided to others and taken by a LEC's payphone operations, however, must

¹⁶ Id.

¹⁷ Id. citing Petition for Declaratory Ruling by the Inmate Calling Services Providers Task Force, Declaratory Ruling, 11 FCC Red 7362 (1996) ("Inmate Services Order"); Petitions for Waiver and Partial Reconsideration or Stay of Inmate-Only Payphones Declaratory Ruling, Order, 11 FCC Red 8013 (Com. Car. Bur. 1996) ("Inmate Services Waiver Order").

¹⁸ Order on Reconsideration at para. 132.

¹⁹ Id. at para. 163.

²⁰ Id. at paras. 162-165. The Commission provided guidelines pursuant to which the states are to review the state tariffs subject to the Payphone Reclassification Proceeding. Id. at para. 163.

be tariffed in both the intrastate and interstate jurisdictions.²¹ In addition, in the Payphone Order, the Commission required that, pursuant to the mandate of Section 276(b)(1)(B), incumbent LECs must remove from their intrastate rates any charges that recover the costs of payphones. The Payphone Order required that states determine the intrastate rate elements that must be removed to eliminate any intrastate subsidies. These revised rates must be effective no later than April 15, 1997.²²

10. In the recent Bureau Waiver Order, we emphasized that LECs must comply with all of the enumerated requirements established in the Payphone Reclassification Proceeding, except as waived in the Bureau Waiver Order, before the LECs' payphone operations are eligible to receive the payphone compensation provided by that proceeding. The requirements for intrastate tariffs are: (1) that payphone service intrastate tariffs be cost-based, consistent with Section 276, nondiscriminatory and consistent with Computer III tariffing guidelines;²³ and (2) that the states ensure that payphone costs for unregulated equipment and subsidies be removed from the intrastate local exchange service and exchange access service rates.²⁴ We stated in the Bureau Waiver Order that LEC intrastate tariffs must comply with these requirements by April 15, 1997 in order for the payphone operations of the LECs to be eligible to receive payphone compensation. The Bureau Waiver Order also clarified the unbundled features and functions subject to the requirements of the Payphone Proceeding.²⁵

11. We noted in the Bureau Waiver Order that the guidelines for state review of intrastate tariffs are essentially the same as those included in the Payphone Order for federal tariffs.²⁶ On reconsideration, the Commission stated that although it had the authority under Section 276 to require federal tariffs for payphone services, it delegated some of the tariffing requirements to the state jurisdiction. The Order on Reconsideration required that state tariffs for payphone services meet the requirements outlined above.²⁷ The Order on Reconsideration provides that states that are unable to review these tariffs may require the LECs to file the tariffs with the Commission.²⁸

12. The Bureau Waiver Order also clarified that, for purposes of meeting all of the requirements necessary to receive payphone compensation, the question of whether a LEC has

²¹ Id. at paras. 162-165.

²² Payphone Order at para. 186.

²³ Order on Reconsideration at para. 163. As stated in the Order on Reconsideration, the intrastate tariffs are subject to the new services test. Order on Reconsideration at para. 163, n. 492.

²⁴ Payphone Order at para. 186.

²⁵ Bureau Waiver Order at paras. 15-19.

²⁶ Id. at para. 32.

²⁷ See para. 6, above.

²⁸ Order on Reconsideration at para. 163.

effective intrastate tariffs is to be considered on a state-by-state basis. Under this approach, assuming the LEC has complied with all of the other compliance list requirements,²⁹ if a LEC has effective intrastate tariffs in State X and has filed tariffs in State Y that are not yet in effect, then the LEC PSP will be able to receive payphone compensation for its payphones in State X but not in State Y. The intrastate tariffs for payphone services, including unbundled features, and the state tariffs removing payphone equipment costs and subsidies must be in effect for a LEC to receive compensation in a particular state.

B. Request for Waiver and Comments

13. On April 10, 1997, the RBOC Coalition, joined by Ameritech, requested that the Commission grant a limited waiver to extend for 45 days the requirement that a LEC's intrastate tariffs for payphone services comply with the federal guidelines set forth in paragraph 163 of the Order on Reconsideration, specifically that those tariffs satisfy the "new services"³⁰ test.³¹ It requests that this 45-day period correspond to the same period of time that the Commission granted in its April 4, 1997 Bureau Waiver Order for limited waiver of the LECs' federal tariffs.³² The RBOC Coalition states that it is not seeking a waiver of the requirement that all of the BOCs have effective intrastate tariffs by April 15, 1997 for basic payphone lines and unbundled features and functions.³³

14. In support of its request, the RBOC Coalition argues that none of the BOCs "understood the payphone orders to require existing, previously-tariffed intrastate payphone services, such as the COCOT/line, to meet the Commission's new services test."³⁴ It further argues that, in some states, there may be a discrepancy between the existing state tariff rates and state tariffs that comply with the new services test, which would require the LEC to file new tariff rates.³⁵ In most states, however, the RBOC Coalition states, "ensuring that previously tariffed payphone services meet

²⁹ See id. at paras. 131-132.

³⁰ The Order on Reconsideration states that "[t]he new services test required in the Report and Order is described at 47 C.F.R. Section 61.49(g)(2). See also Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, 6 FCC Red 4524, 4531(1991) at paras. 38-44." Order on Reconsideration at para. 163, n. 492.

³¹ Ex Parte Letter of Michael Kellogg, Counsel, RBOC Coalition to Mary Beth Richards, Deputy Chief, Common Carrier Bureau, FCC (April 10, 1997) ("RBOC Request"); Ex Parte Letter of Michael Kellogg, Counsel, RBOC Coalition to Mary Beth Richards, Deputy Chief, Common Carrier Bureau, FCC (April 11, 1997) ("RBOC Clarification Letter").

³² RBOC Request at 1.

³³ RBOC Clarification Letter at 1.

³⁴ Id. at 1.

³⁵ Id.

the new services test . . . should not be too problematic."³⁶ The RBOC Coalition argues that this 45-day period would allow the LECs to file new intrastate tariffs in the states where it is necessary without delaying its eligibility to receive compensation.³⁷ It also states that special circumstances exist for a waiver in that the federal new services test had not previously been applied to existing state services, and that the LECs did not understand until the release of the Bureau Waiver Order that the Commission meant to require application of this test to those services.³⁸ The RBOC Coalition also states that "[e]ach LEC will undertake to file with the Commission a written ex parte document, by April 15, 1997, attempting to identify those tariff rates that may have to be revised."³⁹ In addition, the RBOCs state that they voluntarily commit "to reimburse or provide credit to those purchasing the services back to April 15, 1997" . . . "to the extent that the new tariff rates are lower than the existing ones."⁴⁰

15. In ex parte documents filed in response to the submission of the RBOC Coalition, AT&T and MCI each argue that there is no basis for the BOCs' claim that they did not understand that basic intrastate payphone tariffs had to comply with the Commission's "new services" test.⁴¹ In addition, Sprint filed an ex parte document stating that "[w]hether or not the RBOCs exercised good faith in ignoring the plain language of paragraph 163 of the Reconsideration Order . . . is beside the point[.]" because the RBOCs should not be entitled to receive compensation unless they are in compliance with all of the requirements of Section 276 and the Commission's rules.⁴² Both MCI and Sprint oppose the RBOC Coalition's request for a waiver.⁴³ AT&T states, however, that it takes no position on the merits of the RBOC Coalition's request for a waiver, "provided that all necessary cost-based tariffs are in place within the waiver period established by the Bureau's April 4, 1997 Order."⁴⁴

16. More specifically, AT&T contends that the Commission should reiterate that a LEC is not eligible for payphone compensation "until it has provided proof of state action verifying

³⁶ Id.

³⁷ Id. at 2.

³⁸ Id. at 3.

³⁹ Id.

⁴⁰ Id.

⁴¹ Ex Parte Letter of E.E. Estey, Government Affairs Vice President, AT&T to William Caton, Acting Secretary, FCC (April 11, 1997) ("AT&T Letter"); Ex Parte Letter of Mary Sisak, Senior Counsel, MCI to Mary Beth Richards, Deputy Chief Common Carrier Bureau, FCC (April 11, 1997) ("MCI Letter").

⁴² Ex Parte Letter of Richard Juhnke, General Attorney, Sprint to Mary Beth Richards, Deputy Chief, Common Carrier Bureau, FCC (April 11, 1997) ("Sprint Letter").

⁴³ MCI Letter at 1; Sprint Letter at 1.

⁴⁴ AT&T Letter at 1.

the LEC's compliance with Section 276[.]" particularly with regard to the elimination of intrastate payphone subsidies.⁴⁵ AT&T states that the available evidence, namely the "wide and unexplained gap between the reasonably expected rate impacts of the removal of LEC payphone equipment from their regulated accounts and recent actual intrastate rate reductions," suggest that LECs have not removed intrastate payphone subsidies.⁴⁶ MCI argues that while there will be no harm to the BOCs if they are required to have effective intrastate tariffs before they receive compensation, the IXCs that are required to pay the compensation will be harmed because the BOCs will be receiving the compensation provided by the Payphone Reclassification Proceeding while they are still recovering payphone costs through tariffed services.⁴⁷ MCI also argues that the request of the RBOC Coalition would be properly treated as an untimely petition for reconsideration of the Commission's payphone orders.⁴⁸ Sprint contends that the practical effect of granting the relief requested by the RBOC Coalition would be to allow the BOCs to receive compensation before they have in effect cost-based rates at the state level for their payphone services.⁴⁹ Sprint contends further that it is inconceivable that this "premature imposition of [the compensation] burden on IXCs and their customers could be squared with the public interest . . .".⁵⁰ On the other hand, Sprint states that it would not object to allowing the LECs to defer the effective date of the reductions in their interstate common carrier line reductions in those states where they have yet to fulfill all of the requirements for compensation.⁵¹

17. The American Public Communications Council ("APCC"), a trade association of independent PSPs, contends in an ex parte filing that there was no ambiguity in the Payphone Reclassification Proceeding that existing payphone service tariffs are subject to the "new services" test.⁵² APCC further contends that allowing the LECs to collect compensation before "complying with a key condition for any competitive telecommunications market -- cost-based interconnection with bottleneck facilities -- would be contrary to the basic purposes of the Act and the [Payphone Reclassification Proceeding]." ⁵³ APCC proposes, instead, that the LECs should be allowed "to defer

⁴⁵ Id. at 3. AT&T further contends that "[s]pecifically, the Commission should make it clear that no LEC is entitled to receive payphone compensation in any state until (1) it provides evidence that its state commission has actually considered these matters and (2) the state has affirmatively determined that all payphone subsidies have been eliminated from intrastate rates." Id. (emphasis in the original).

⁴⁶ Id.

⁴⁷ MCI Letter at 1.

⁴⁸ Id. at 2.

⁴⁹ Sprint Letter at 2.

⁵⁰ Id.

⁵¹ Id. at 3.


⁵² Ex Parte Letter of Albert Kramer, Counsel, APCC to Mary Beth Richards, Deputy Chief, Common Carrier Bureau, FCC (April 11, 1997) ("APCC Letter").

⁵³ Id. at 2.

the effective date of . . . detariffing requirements for a 90-day period to allow them to bring their state payphone services tariffs into compliance with the [Payphone Reclassification Proceeding], provided that the LEC refiles all its state-tariffed services offered to PSPs, so as to ensure state commissions an opportunity to review all payphone interconnection services under the required uniform pricing standard."⁵⁴ APCC argues that the Commission "must simply order all tariffs to be refiled."⁵⁵

C. Waiver

18. Upon reviewing the contentions of the RBOC Coalition and the language it cites from the two orders in the Payphone Reclassification Proceeding, we conclude that while the individual BOCs may not be in full compliance with the intrastate tariffing requirements of the Payphone Reclassification Proceeding, they have made a good faith effort to comply with the requirements. The RBOC Coalition concedes that the Commission's payphone orders, as clarified by the Bureau Waiver Order, mandate that the payphone services a LEC tariffs at the state level are subject to the new services test and that the requisite cost-support data must be submitted to the individual states.⁵⁶ In addition, the RBOC Coalition states that it will take whatever action is necessary to comply with the Commission's orders in order to be eligible to receive payphone compensation at the earliest possible date.⁵⁷ Therefore, we adopt this Order, which contains a limited waiver of the federal guidelines for intrastate tariffs, specifically the requirement that LECs have filed intrastate payphone service tariffs as required by the Order on Reconsideration and the Bureau Waiver Order that satisfy the new services test, and that effective intrastate payphone service tariffs comply with the "new services" test of the federal guidelines for the purpose of allowing a LEC to be eligible to receive payphone compensation, as discussed below. The existing intrastate tariffs for payphone services will continue in effect until the intrastate tariffs filed pursuant to the Order on Reconsideration, the Bureau Waiver Order and this Order become effective. Because other LECs may also have failed to file the intrastate tariffs for payphone services that comply with the "new services" test of the federal guidelines, we apply this limited waiver to all LECs, with the limitations set forth herein.



19. Consistent with our conclusions above and in the interests of bringing LECs into compliance with the requirements of the Payphone Reclassification Proceeding, we waive for 45 days from the April 4, 1997 release date of the Bureau Waiver Order the requirement that LEC intrastate tariffs for payphone services comply with the "new services" test of the federal guidelines, as set forth in paragraph 163 of the Order on Reconsideration and clarified in the Bureau Waiver Order. Pursuant to the instant Order, LECs must file intrastate tariffs for payphone services, as required by the Payphone Reclassification Proceeding consistent with all the requirements set forth

⁵⁴ Id. at 3 (emphasis in the original).

⁵⁵ Id. (emphasis in the original).

⁵⁶ RBOC Request at 1-3.

⁵⁷ Id.

in the Order on Reconsideration, within 45 days of the April 4, 1997 release date of the Bureau Waiver Order. Any LEC that files these intrastate tariffs for payphone services within 45 days of the release date of the Bureau Waiver Order will be eligible to receive the payphone compensation provided by the Payphone Reclassification Proceeding as of April 15, 1997, as long as that LEC has complied with all of the other requirements set forth in paragraph 131 (and paragraph 132 for the BOCs) of the Order on Reconsideration, subject to the clarifications and limited waiver in the Bureau Waiver Order.⁵⁸ Under the terms of this limited waiver, a LEC must have in place intrastate tariffs for payphone services that are effective by April 15, 1997. This waiver permits the LEC to file intrastate tariffs that are consistent with the "new services" test of the federal guidelines set forth in the Order on Reconsideration, as clarified by the Bureau Waiver Order.⁵⁹ The existing intrastate payphone service tariffs will continue in effect until the intrastate tariffs filed pursuant to this Order become effective.⁶⁰

20. The RBOC Coalition and Ameritech have committed, once the new intrastate tariffs are effective, to reimburse or provide credit to its customers for these payphone services from April 15, 1997, if newly tariffed rates, when effective, are lower than the existing rates. This action will help to mitigate any delay in having in effect intrastate tariffs that comply with the guidelines required by the Order on Reconsideration, including the concern raised by MCI that the subsidies from payphone services will not have been removed before the LECs receive payphone compensation.⁶¹ A LEC who seeks to rely on the waiver granted in the instant Order must also reimburse their customers or provide credit, from April 15, 1997, in situations where the newly tariffed rates are lower than the existing tariffed rates. We note, in response to the arguments raised by the IXC's, that because this Order does not waive the requirement that subsidies be removed from local exchange service and exchange access services, the "harm" to the IXC's resulting from the delayed removal of subsidies from some intrastate payphone service tariffs will be limited.

21. We conclude that the waiver we grant here, which is for a limited duration to address a specific compliance issue, is consistent with, and does not undermine, the rules adopted by the Commission in the Payphone Reclassification Proceeding. Therefore, we reject the various alternatives to granting a waiver that were suggested by APCC and the IXC's. More specifically, we conclude that APCC's proposal to require the refiling of all intrastate payphone service tariffs would unduly delay, and possibly undermine, the Commission's efforts to implement Section 276 and the congressional goals of "promot[ing] competition among payphone service providers and promot[ing]

⁵⁸ Because the industry has elected to bill for and pay out compensation on a quarterly basis, the actual payment for compensation that begins to accrue on April 15, 1997 will not be made until after the requisite intrastate tariffs are filed.

⁵⁹ Bureau Waiver Order at paras. 29-33.

⁶⁰ The states must act on the tariffs filed pursuant to this Order within a reasonable period of time. The Commission retains jurisdiction under Section 276 to ensure that all requirements of that statutory provision and the Payphone Reclassification Proceeding, including the intrastate tariffing of payphone services, have been met. 47 U.S.C. § 276.

⁶¹ Order on Reconsideration at para. 163.

the widespread deployment of payphone services to the benefit of the general public. . .".⁶² In response to Sprint's proposal that we delay the effective date of the LECs' interstate carrier common line reductions, we conclude that the better approach would be to evaluate requests for such treatment by individual LECs on a case-by-case basis. In addition, we decline to treat the request of the RBOC Coalition as an untimely petition for reconsideration of the Commission's rules, because the RBOC Coalition does not seek reconsideration of the rules adopted in the Payphone Reclassification Proceeding, but instead seeks additional time, in a specific, limited circumstance, to comply with those rules.

22. In response to AT&T's arguments that a LEC must show proof that its intrastate tariffs have removed payphone subsidies consistent with Section 276, we note the Commission concluded that "[t]o receive compensation a LEC must be able to certify"⁶³ that it has satisfied each of the individual prerequisites to receiving the compensation mandated by the Payphone Reclassification Proceeding.⁶⁴ The Commission did not require that the LECs file such a certification with it. Nothing in the Commission's orders, however, prohibits the IXCs obligated to pay compensation from requiring that their LEC payees provide such a certification for each prerequisite. Such an approach is consistent with the Commission's statement that "we leave the details associated with the administration of this compensation mechanism to the parties to determine for themselves through mutual agreement."⁶⁵

23. Waiver of Commission rules is appropriate only if special circumstances warrant a deviation from the general rule⁶⁶ and such deviation serves the public interest.⁶⁷ Because the LECs are required to file, and the states are required to review, intrastate tariffs for payphone services consistent with federal guidelines, which, in some cases, may not have been previously filed in this manner at the intrastate level, we find that special circumstances exist in this case to grant a limited waiver of brief duration to address this responsibility. In addition, for the reasons stated above, our grant of a waiver in this limited circumstance, does not undermine, and is consistent with, the Commission's overall policies in CC Docket No. 96-128 to reclassify LEC payphone assets and ensure fair PSP compensation for all calls originated by payphones. Moreover, the states' review of the intrastate tariffs that are the subject of this limited waiver will enable them to determine whether these tariffs have been filed in accordance with the Commission's rules, including the "new services" test. Accordingly, we grant a limited waiver for 45 days from the April 4, 1997 release date of the Bureau Waiver Order the requirement that LEC intrastate tariffs for payphone services comply with

⁶² 47 U.S.C. § 276(b)(1).

⁶³ Order on Reconsideration at para. 131 (emphasis added).

⁶⁴ See para. 6, above.

⁶⁵ Order on Reconsideration at para. 115.

⁶⁶ Northeast Cellular Telephone Company v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

⁶⁷ WAT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

FEDERAL COMMUNICATIONS COMMISSION

Regina M. Keeney
Chief, Common Carrier Bureau

Munnerlyn, Carol J.

From: Harlow, Brooks
Sent: Thursday, November 17, 2005 12:44 PM
To: Pamela.Arluk@fcc.gov
Cc: Tamara Preiss
Subject: NPCC v. Oregon PUC

Attached, as you requested, is a copy last year's Oregon Court of Appeals decision in *Northwest Public Comm's Council v. PUC*, 196 Ore. App. 94, 100 P.3d 776 (2004).

Thank you for your time this morning. Please let me know if there are any additional documents that I can provide.



Opinion.pdf (804
KB)

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FILED: November 10, 2004

IN THE COURT OF APPEALS OF THE STATE OF OREGON

NORTHWEST PUBLIC COMMUNICATIONS
COUNCIL, fka The Northwest Payphone
Association,

v.

PUBLIC UTILITY COMMISSION OF
OREGON,

and

QWEST CORPORATION,

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MILLER NASH LLP

Appellant,

Respondent,

Intervenor-Respondent.

02C-12247; A119640

Appeal from Circuit Court, Marion County.

Richard D. Barber, Judge.

Argued and submitted March 16, 2004.

Brooks E. Harlow argued the cause for appellant. With him on the briefs were
William H. Walters and Miller Nash LLP.

Jas. Jeffrey Adams, Assistant Attorney General, filed the brief for respondent.
With him on the brief were Hardy Myers, Attorney General, and Mary H.
Williams, Solicitor General.

John P. Nusbaum argued the cause for intervenor-respondent. With him on the
brief were Lawrence Reichman and Perkins Coie LLP, and Alex Duarte and
Qwest Corporation.

Before Edmonds, Presiding Judge, and Wollheim and Schuman, Judges.

EDMONDS, P. J.

Reversed and remanded with instructions to remand to the PUC for
reconsideration.

Wollheim, J., concurring.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Appellant

- ☐ No costs allowed.
☒ Costs allowed, payable by: Respondent and Intervenor-Respondent
☐ Costs allowed, to abide the outcome on remand, payable by:
-

1 EDMONDS, P. J.

2 Appellant Northwest Public Communications Council is an organization of
3 businesses that provide pay telephone service to the public. The businesses use the
4 telephone lines and other services of regulated local exchange carriers (LECs) to carry out
5 their activities.¹ Appellant appeals a decision of the trial court that affirmed the order of
6 respondent Oregon Public Utilities Commission (PUC) setting the rates that respondent
7 Qwest Corporation (Qwest), a regulated LEC, charges appellant's members for payphone
8 services² in Oregon. We reverse and remand.

9 Appellant challenges the PUC's final order in Docket UT-125 and its order
10 on reconsideration of the payphone aspects of that final order. In Docket UT-125 the
11 PUC evaluated the rate schedule that Qwest filed for all of its regulated intrastate
12 services, not just those relating to payphones. Under state law, the PUC's responsibility
13 was to determine, after a hearing, whether Qwest had proved that its proposed rates were
14 just and reasonable, and, if they were not, to adjust the rates so that they were. *See* ORS
15 759.180(1). In making that determination, the PUC followed the traditional procedure for
16 reviewing a regulated utility's rate schedule. In the first phase of the proceeding, it
17 established the rate of return that Qwest was entitled to receive on its property that is used

¹ The record and the parties' briefs contain a number of acronyms, not all of which are discussed or explained in the briefs. Although we were able to determine the meaning of each relevant acronym, it would have been helpful if the parties had provided a separate list for our reference.

² We will use "payphone services" to refer both to telephone lines and to other services when that usage is clear from the context of our discussion.

1 or useful for providing regulated services in Oregon (Qwest's rate base). In the second
2 phase, the PUC evaluated the rates that Qwest proposed for its various services and made
3 appropriate adjustments so that, as a package, they would provide it the opportunity to
4 earn that return. One consequence of following the traditional method is that reducing the
5 rates for one service is likely to require raising the rates for another. That is necessary in
6 order to provide Qwest an opportunity to earn the intended rate of return on its rate base
7 as a whole. Thus, the rates for one service may be greater than Qwest's costs while the
8 rates for another may be less. When that happens, the first service is said to subsidize the
9 second.

10 In its final order, the PUC adopted Qwest's proposal for the rates that a
11 payphone service provider (PSP), such as appellant's members, will pay for the use of a
12 payphone access line (PAL). It agreed with Qwest that those rates should be essentially
13 the same as the rates that Qwest charges for a business phone line. As well as paying for
14 a PAL, a PSP will also need to use Qwest's CustomNet call screening service, which
15 permits a PSP to avoid fraudulent use of the payphone.³ The PUC approved Qwest's
16 proposed rate for CustomNet without examining Qwest's cost of providing the service.
17 Although a majority of Qwest's lines that have CustomNet service are PALs, the service
18 is available for other lines as well, and 37 percent of lines with CustomNet serve

³ For example, the service will prevent customers from making long distance calls at the local call rate.

1 customers other than PSPs.⁴

2 Appellant does not challenge the rates for PALs and CustomNet under
3 Oregon law. Rather, it argues that federal law requires the PUC to use a different rate-
4 setting method for payphone services instead of the traditional method that the PUC used.
5 Appellant relies on 47 USC section 276 (section 276), as amended by the
6 Telecommunications Act of 1996 (the Act), and on orders that the Federal
7 Communications Commission (FCC) has issued pursuant to section 276. Section 276 and
8 those orders, according to appellant, have fundamentally changed the method for setting
9 rates for payphone services that Bell operating companies (BOCs), including Qwest,
10 provide to PSPs.⁵ The fundamental shift is that section 276 requires the PUC to focus on
11 a BOC's cost of providing the specific payphone service at issue rather than on its total
12 rate of return, thereby allowing PSPs to compete with the BOC's own payphones on a
13 more equal footing. According to appellant, the PUC erred because it failed to apply the
14 FCC's approach.

15 We begin our analysis by examining the overall purpose of the Act, which
16 is to promote competition in the telecommunications industry. Section 276 describes its

⁴ Qwest's own payphone lines receive CustomNet service. It is not clear from the order whether the PUC treated Qwest as a PSP in making this calculation, whether Qwest's payphone lines are included in the 37 percent that are not PSP lines, or whether they are excluded from the calculation entirely.

⁵ BOCs are those LECs that were part of the former Bell System, which provided the great majority of local telephone service throughout the country, and their successors. They are listed in 47 USC § 153(4)(A) as they existed at the Act's adoption. Section 276 applies primarily to BOCs, not to other LECs.

1 specific purpose as "to promote competition among payphone service providers and
2 promote the widespread deployment of payphone services to the benefit of the general
3 public[.]" Section 276(b)(1). For many years, LECs were the sole providers of payphone
4 services. The traditional regulatory approach permitted them to subsidize their payphone
5 services from their earnings on other services, a practice known as cross-subsidization.
6 Section 276 prohibits such cross-subsidization for LECs that are also BOCs. Section
7 276(a) provides:

8 "After the effective date of the rules prescribed pursuant to
9 subsection (b) of this section, any Bell operating company that provides
10 payphone service--

11 "(1) shall not subsidize its payphone service directly or indirectly
12 from its telephone exchange service operations or its exchange access
13 operations; and

14 "(2) shall not prefer or discriminate in favor of its payphone service."

15 As the District of Columbia Circuit Court of Appeals has explained, this section "is
16 designed to replace a state-regulated monopoly system with a federally facilitated,
17 competitive market." *New England Public Communications v. F.C.C.*, 334 F3d 69, 77
18 (DC Cir 2003).

19 Section 276(b) requires the FCC to prescribe regulations to implement the
20 statute in ways that will achieve five specific goals. One of those goals is to provide
21 nonstructural safeguards to prevent cross-subsidization that, at a minimum, include the
22 standards that the FCC had previously adopted for certain new telecommunications
23 services and that are known as the Computer III standards. Section 276(b)(1)(C).

1 Finally, section 276(c) provides that, "[t]o the extent that any State requirements are
2 inconsistent with the Commission's regulations," the regulations preempt those state
3 requirements.

4 The FCC has not promulgated regulations under section 276 in accordance
5 with the procedures described in 5 USC section 553. However, it has issued several
6 detailed orders to resolve issues under the section, two of which directly apply to this
7 case. The first is an order of the FCC's Common Carrier Bureau (CCB), *In the Matter of*
8 *Wisconsin Public Service Commission*, CCB/CPD No. 00-1 (2000) (the Wisconsin
9 Order).⁶ At the time of the PUC's decisions in this case, the Wisconsin Order was the
10 most recent statement of the FCC's position, but it was under appeal to the full
11 commission. Shortly after the PUC issued its decision on reconsideration in this case, the
12 full commission issued the second order, its decision on the appeal, *In the Matter of*
13 *Wisconsin Public Service Commission Order*, Bureau/CPD No. 00-01 (2002) (the New
14 Services Order). The FCC modified the Wisconsin Order in some respects but generally
15 affirmed it. The District of Columbia Circuit subsequently affirmed the New Services
16 Order on judicial review. *New England Public Communications*, 334 F3d at 79.

17 Before the PUC, appellant relied on the Wisconsin Order to support its
18 position regarding the effect of section 276. On appeal, it relies both on that order and on
19 the New Services Order. Qwest and the PUC counter that, for at least two reasons, those
20 orders are not a statement of the law that either the PUC or we must follow. First, they

⁶ We describe the FCC orders by the names that the parties use for them.

1 point out that only the Wisconsin Order existed at the time that the PUC acted and that the
2 New Services Order modifies the Wisconsin Order in some respects. From those
3 premises, they conclude that the Wisconsin Order was not the final word on the issues
4 that it discussed and that the PUC did not err in refusing to rely on it. They also argue
5 that, because the PUC had no opportunity to consider the New Services Order, it cannot
6 have erred by failing to follow it. The problem with those arguments is that they ignore
7 the preemptive effect of section 276.

8 The District of Columbia Circuit Court of Appeals treats the FCC's orders
9 under section 276 as binding on every state, and so do we. In affirming the New Services
10 Order, the court stated that the "Commission implemented section 276 in a series of
11 orders," including the New Services Order. *New England Public Communications*, 334
12 F3d at 71. It further explained that that order "establishes a rule that affects payphone
13 line rates in every state," rather than being limited to Wisconsin, as Qwest and the PUC
14 assert. *Id.* at 75. The PUC must reconsider its order in light of the New Services Order
15 and other relevant FCC orders.⁷

16 Reversed and remanded with instructions to remand to the PUC for
17 reconsideration.

⁷ The concurrence describes a number of specific problems that it finds in the PUC's order. Although we do not find it necessary to consider those issues at this time, we do not necessarily disagree with the concurrence's discussion.

1 WOLLHEIM, J., concurring.

2 I agree with the majority's decision to remand this case to the PUC.¹ The
3 majority does not, however, consider a number of issues that I think are ready for our
4 resolution at this time. Because I would reach those issues as part of deciding this case, I
5 concur in order to describe how I would decide them.

6 Before the PUC appellant argued that section 276 required the PUC to set
7 rates in accordance with the principles in the statute and in the FCC's previous orders. It
8 relied on the Wisconsin Order to support its position concerning what the statute and
9 those previous orders required. By arguing that the PUC should follow the Wisconsin
10 Order, appellant was arguing that that order correctly applied section 276 and the FCC's
11 previous orders and that the PUC was required to apply those orders to this case. The
12 issue for the PUC was to determine the effect of section 276 on Qwest's proposed rates
13 for payphone service; appellant's reliance on the Wisconsin Order was, in effect, reliance
14 on all of the FCC's decisions on that issue. The issue before us is whether the PUC's
15 order is unlawful because it failed to conform to the requirements of section 276 as the
16 FCC has established them. *See* ORS 756.590. In making that determination I must
17 consider all relevant sources related to those issues, whether or not they existed at the
18 time that the PUC acted. *Cf. State v. Jury*, 185 Or App 132, 136, 57 P3d 970 (2002), *rev*
19 *den*, 335 Or 504 (2003) (appellate court generally determines error based on law as it

¹ I use the same acronyms and short titles that the majority uses.

1 exists at time of appellate decision, not time of trial court decision). Because the New
2 Services Order is the FCC's most recent statement of its position, that order will play a
3 significant role in my analysis.

4 Qwest and the PUC also argue that the FCC's orders are not binding on the
5 PUC, in part because they are orders rather than formally adopted regulations and in part
6 because they apply only to four LECs in Wisconsin. Neither argument is correct. The
7 FCC treats its orders as containing the regulations that the statute requires it to issue,
8 stating in a recent order that "[i]n a series of orders starting in 1996, the Commission
9 promulgated pay telephone service regulations to implement section 276 of the Act, as
10 amended by the Telecommunications Act of 1996[.]" *In the Matter of Request to Update*
11 *Default Compensation Rate for Dial-Around Calls from Payphones*, ¶ 2, WC Docket No.
12 03-225 (2004) (emphasis added). In the New Services Order, it explained that its
13 discussion would "assist states in applying the new services test" in order to ensure
14 compliance with section 276 and the FCC's previous orders. New Services Order, ¶ 2. It
15 also noted that in a previous order it had preempted all state rules that were inconsistent
16 with the Computer III nonstructural safeguards. *Id.* at ¶ 15. I agree with the majority that
17 those orders are binding on every state.

18 In all of its orders the FCC, consistently with the criteria in section
19 276(b)(1), has emphasized the general deregulatory and procompetitive nature of the Act.
20 In essence, a BOC must place its own payphones on an equal footing with those that PSPs
21 operate, and it must not obtain a profit from PSP payphones. In order to achieve that

1 result, the FCC requires BOCs to provide payphone services at rates that satisfy the cost-
2 based "new services test" that it had previously developed in the Computer III order and
3 that Congress expressly required it to apply to payphone rates. Under that test, the cost
4 for a service should be the direct cost of providing the service, together with an
5 appropriate level of overhead costs. *New England Public Communications v. F.C.C.*, 334
6 F3d 69, 71-72 (DC Cir 2003). That approach is different from the traditional regulatory
7 approach of adjusting rates with limited regard to the cost of individual services but,
8 instead, with a focus on the utility's total return on its rate base.

9 In the Wisconsin Order, the CCB summarized its understanding of the
10 FCC's previous payphone orders,² explaining the criteria that it would apply in reviewing
11 the rates based on the Computer III requirements and previous FCC orders. First, an LEC
12 must demonstrate that its proposed rates "do not recover more than the direct costs of the
13 service plus 'a just and reasonable portion of the carrier's overhead costs.'" Those costs
14 "must be determined by the use of an appropriate forward-looking, economic cost
15 methodology" that is consistent with the FCC's previous orders. Wisconsin Order, ¶ 9
16 (quoting 47 CFR § 61.49(f)(2)).³ In calculating direct costs, the LEC should use

² The case came before the FCC under its direct regulatory authority because the Wisconsin Public Services Commission had concluded that it did not have the jurisdiction under state law to apply the requirements of section 276 in a rate-making proceeding. The CCB required the four largest LECs in that state to file their tariffs and supporting information concerning their payphone services with the CCB so it could review their rates for compliance with section 276.

³ 47 CFR § 61.49(f)(2) describes information that certain LECs must file to support rates for certain new services. Its requirements are not limited to payphone services.

1 methodologies that are consistent with those used in computing rates for other services
2 offered to competitors. *Id.* at ¶ 10.

3 Secondly, the LEC must justify the methodology that it used to determine
4 its overhead costs. If it does not do so, it may not recover a greater share of overhead in
5 the payphone rates than it does in rates for comparable services. Other services that the
6 LEC provides to competitors are the most likely comparable services for this purpose.
7 "Given that the new services test is a cost-based test, overhead allocations must be based
8 on cost, and therefore may not be set artificially high in order to subsidize or contribute to
9 other LEC services." Wisconsin Order, ¶ 11. Finally, in order to avoid double recovery
10 of costs, an LEC must demonstrate that it has taken into account other sources of revenue
11 that it used to recover the costs of the facilities provided. The order listed several specific
12 other charges that the LEC had to deduct from the payphone rates. *Id.* at ¶ 12.

13 On appeal, the FCC generally agreed with the CCB. It emphasized that the
14 Commission requires that BOC⁴ payphone rates be cost-based. New Services Order, ¶ 42.
15 It described the new services test as flexible and cost-based and emphasized that the
16 methodologies used must be forward-looking and, thus, not based on a particular return
17 on an existing rate base. *Id.* at ¶ 43. Section 276 and the FCC's previous orders had
18 established "a new regulatory regime for payphone services," requiring the use of the new
19 services test whether or not the service was literally "new." *Id.* at ¶ 46. The test is
20 flexible because a state may use any pricing methodology that meets the criteria that the

⁴ Because of its conclusion that section 276 applies only to BOCs, the FCC did not discuss payphone pricing for other LECs. New Services Order, ¶ 42.

1 FCC described. The FCC stated that two specific commonly used methodologies would
2 meet those criteria. *Id.* at ¶ 49.

3 Under the new services test a price consists of two elements: the actual cost
4 of providing the service and a reasonable contribution to overhead. The Wisconsin Order
5 emphasized that overhead allocations must themselves be based on cost and may not be
6 artificially high in order to subsidize or contribute to other LEC services. The Wisconsin
7 Order required LECs to use a specific method, unbundled network elements (UNE)
8 loading, in order to calculate overhead and required them to explain overhead allocations
9 that significantly departed from those amounts. New Services Order at ¶ 51. In the New
10 Services Order the FCC agreed with the CCB that overhead allocations must be based on
11 cost and may not be artificially high. It agreed that UNE loading was a proper method to
12 determine the ceiling for overhead, but it indicated that other methods were also
13 permissible and might be preferable. *Id.* at ¶ 52. One of those possibilities was to
14 compute the direct costs of services that competed with services offered by competitors,
15 to subtract those costs from the lowest rates for those competitive services, and to treat
16 the difference as representing the contribution to overhead. A BOC could then set
17 overhead for the rate being determined at the lowest overhead rate for those competitive
18 services. *Id.* at ¶ 53.

19 The LECs argued to the FCC that a BOC may apply to PAL rates whatever
20 markup it uses in business line rates. The LECs made that argument even though
21 business line rates may include subsidies for other services. The FCC rejected it. BOCs

1 do not have virtually unlimited flexibility in determining the overhead component of PAL
2 rates. Rather, they must affirmatively justify their overhead allocations. New Services
3 Order at ¶¶ 55, 56. The evaluation of overhead allocations is fact-specific, and the LECs'
4 suggestion that a wide range is reasonable is incorrect. "Consistent[ly] with Commission
5 precedent, the BOCs bear the burden of justifying their overhead allocations for payphone
6 services and demonstrating compliance with our standards." *Id.* at ¶¶ 57, 58. Finally, the
7 FCC modified the Wisconsin Order concerning whether cost based rates must be reduced
8 to take account of certain federally tariffed charges. It agreed with the CCB as to one
9 such charge but not as to another. *Id.* at ¶¶ 59-61.

10 On appeal, appellant argues that the PUC failed to follow federal law in
11 setting rates for payphone services. It also argues that section 276 requires Qwest to
12 provide far more detailed information, including engineering and time and wage studies,
13 concerning its direct and overhead costs than the PUC required. That information is
14 necessary, appellant says, so the PUC can set Qwest's PAL rates based on its actual costs.
15 Appellant specifically objected to Qwest adding a market-driven return factor to its PAL
16 rates instead of basing them strictly on cost and overhead. I first describe the PUC's
17 orders and then evaluate them in light of the New Services Order.

18 In its original order, which resolved many issues concerning Qwest's overall
19 rate schedule in addition to the payphone issues, the PUC generally rejected appellant's
20 arguments.⁵ It summarized the FCC's requirements as being that PAL rates be cost based,

⁵ The PUC refused to rely on the Wisconsin Order on the grounds that it applied only to the specific Wisconsin LECs that it named, that it was on appeal, and that

1 encourage the deployment of payphones, be nondiscriminatory, and pass the new services
2 test, which the PUC described as requiring that rates be cost based with reasonable
3 overhead. It found appellant's reading of the requirements, in particular the amount of
4 information needed to make the necessary determinations, to be overly formal. Instead of
5 seeking detailed information in order to make a new determination of costs, as appellant
6 requested, the PUC decided that costs determined in UM 773, a previous PUC
7 proceeding, were a reasonable approximation of Qwest's direct costs. It noted that Qwest
8 used those costs to figure its direct costs. The PUC then concluded that the cost-to-price
9 ratio based on those costs was sufficient to infer the overhead on payphone rates. Qwest's
10 rates for payphone services were between 26 and 91 percent above direct costs, which the
11 PUC stated was a reasonable ratio. It noted that the FCC and other state commissions had
12 approved overhead loadings up to 4.8 times direct costs. The PUC rejected appellant's
13 argument that cost based rates had to be set at cost. Rather, it stated, that it is permissible
14 to include contribution⁶ and a market driven return in those rates.

15 The PUC next rejected appellant's argument that CustomNet is subject to
16 the new services test. It concluded that only payphone specific services are subject to that
17 test and that CustomNet is not payphone specific. Rather, it is a retail tariffed service that
18 any customer may purchase, and 37 percent of the lines with it serve customers other than

the appealing parties had requested a stay.

⁶ The meaning of "contribution" is not clear from the record. Appellant treats it as meaning contribution from PAL rates to other Qwest services rather than contribution to overhead. It is thus an amount in addition to overhead. My subsequent discussion is based on that understanding.

1 PSPs. Finally, the PUC decided that Qwest could include federally tariffed charges in its
2 rates; it notes that Qwest includes those charges in the rates for all access lines, including
3 the lines that it provides to its own payphone division.⁷ PUC Order, 56

4 I first consider appellant's challenges to the rates for PALs. Although
5 Qwest has the burden of proving the reasonableness of its rates to the PUC, New Services
6 Order, ¶ 56, on review of the PUC's order appellant has the burden "to show by clear and
7 satisfactory evidence that the order is unreasonable or unlawful." ORS 756.594.

8 Appellant first argues that the PUC failed to comply with the requirement that the rates be
9 based "on the direct costs of the service, plus 'a just and reasonable portion of the carrier's
10 overhead costs.'" New Services Order, ¶ 23 (quoting Wisconsin Order, ¶ 9). I first
11 consider the PUC's determination of Qwest's direct costs. The PUC based its
12 determination of those costs on a previous proceeding, UM 773, stating that the costs
13 from that proceeding are "a reasonable approximation of direct costs." The FCC's orders,
14 however, do not contemplate "a reasonable approximation"; rather, they contemplate a
15 determination of direct costs through the use of an appropriate forward-looking economic
16 cost methodology. The FCC has expressly approved two such methodologies and has
17 indicated that others may also be permissible. The PUC's order does not discuss the
18 methodology that it used in UM 773 or otherwise show that it satisfies the FCC's
19 requirements. Without that information it was impossible for the PUC to conclude that it

⁷ On reconsideration, the PUC adhered to those conclusions, emphasizing that the FCC had described the new services test as flexible. It described appellant's view of the new services test and the necessary supporting material as overly formalistic.

1 had a sufficient basis for finding that Qwest met its burden before the agency. Thus,
2 appellant has carried its burden before us of showing that the PUC's order is unlawful in
3 this respect.⁸

4 The PUC erred in a number of other respects. First, it set PAL rates at the
5 same rate for business services without separately evaluating the direct costs and
6 contribution to overhead for PALs and without considering whether the business rates
7 include a contribution to other services. As the New Services Order indicates, that is
8 inconsistent with the fundamental purpose of section 276 to set payphone rates at a level
9 that will permit PSPs to compete with BOC payphones on an even footing. *See New*
10 *Services Order*, ¶ 54. Unless business line rates are themselves based on the new services
11 test, they are not an appropriate standard for PAL rates. Secondly, for the same reason
12 including contributions to other Qwest services and a market-driven return for Qwest in
13 the rates is impermissible. The requirement that rates be based on costs plus overhead by
14 itself prohibits any market-driven premium over those levels.

15 Third, the PUC failed to follow the requirements for determining the
16 overhead portion of a PAL rate. It relied primarily on the ratio between Qwest's direct
17 costs and its prices to determine the amount of overhead in its PAL rates and then found
18 that that ratio was permissible in light of the FCC's previous decisions that permitted

⁸ Appellant also argues that the PUC should have required Qwest to provide specific information concerning its costs. Because, in my view, the PUC on remand will have to determine whether the methodology of UM 773 was appropriate and, if not, what other methodology it will use, and because the methodology that the PUC chooses may well affect what evidence is relevant, I do not need to discuss that issue at this time.

1 ratios of overhead to costs as high as 4.8 to 1. PUC Order, 55. There are at least two
2 problems with the PUC's approach. First, the FCC allows the use of the ratio between
3 direct costs and prices only for competitive services, and it requires that those costs be
4 deducted from the lowest rates charged for those competitive services in order to
5 determine the contribution to overhead "from these competitive services." New Services
6 Order, ¶ 53. There is nothing that permits using that approach for the noncompetitive
7 rates that the PUC considered. In addition, the FCC has explained that the decision in
8 which it permitted high overhead loadings was an unusual situation in which the LEC
9 provided adequate justification and that involved payphone features that cost only a few
10 cents per line per month. *Id.* at ¶ 57. Although state regulators may use a flexible
11 approach to calculating the overhead allocation to PALs, *id.* at ¶ 58,

12 "BOCs bear the burden of affirmatively justifying their overhead
13 allocations. In general, in our decisions applying the new services test to
14 services offered to competitors, we have allowed BOCs some flexibility in
15 calculating overhead allocations, but we have carefully reviewed the
16 reasonableness of BOCs' overhead allocations. We have *not* simply
17 accepted any 'plausible benchmark' proffered by an [*sic*] BOC."

18 *Id.* at ¶ 56 (emphasis in original).

19 The PUC did not require Qwest to meet the burden that the FCC requires.
20 Rather, it assumed that Qwest's noncompetitive rates included a reasonable ratio of
21 overhead and simply applied that ratio to its PAL rates, approving business line and PAL
22 rates that were essentially identical. On remand, it should evaluate Qwest's costs and
23 overhead in accordance with the requirements of the New Services Order, ensuring that it

1 has sufficient information to do so.⁹ Section 276 requires a new approach to rates for
2 payphone services; it may be difficult to satisfy the requirements of that section by simply
3 tinkering with the traditional regulatory approach.

4 The remaining issue is whether CustomNet is subject to the New Services
5 Order. It is clear that the new services test applies to all payphone specific services.
6 Although CustomNet is primarily a payphone service that Qwest uses on its own
7 payphones, a significant number of non-PSPs also use it. The FCC has rejected the
8 argument that a BOC can avoid applying the new services test to a particular service
9 simply by tariffing it in a non-payphone specific way. New Services Order, ¶ 64 n 139. It
10 has also held that call screening is a payphone specific service. The parties have not
11 pointed to any FCC decision concerning whether a payphone specific service is exempt
12 from the new services test because it is also available to, and actually used by,
13 nonpayphone customers. In its order the PUC assumed that such services are exempt. In
14 making that assumption, it did not consider the underlying purpose of section 276 and the
15 new services test, which is to reduce rates for PALs and related services to the level of the
16 BOC's direct costs and overhead in order to encourage competition in providing payphone
17 services. To permit Qwest to supply a needed payphone service at a rate above that level
18 is inconsistent with that purpose and may be inconsistent with the FCC's orders. Because
19 the PUC did not consider that issue from the correct perspective, its decision is not
20 lawful. I would require it to reconsider the question on remand.

⁹ This includes the requirement that Qwest must reduced its PAL rates by the amount of a specific federally-tariffed charge. New Services Order, ¶ 61.

1

I concur in the majority's opinion.